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In The

# Supreme Court of the United States

October Term, 1994

THE LONG ISLAND RAILROAD COMPANY,

*Petitioner,*

*vs.*

JOHN J. MARCHICA,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit err in holding that a cognizable claim may be made under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, for the negligent infliction of emotional distress based upon fear of developing a disease, when the standard the Court utilized was unreasonable and would improperly impose upon railroad operators the likelihood of vast liability for minor injuries?

2. Did the Court of Appeals for the Second Circuit err in holding that the broad remedial purposes of FELA justify recognition of a claim for the negligent infliction of emotional distress based upon fear of developing a disease, in the absence of any proof of exposure to the disease and thus contrary to the standards generally recognized under the common law?

3. Did the Court of Appeals for the Second Circuit err in affirming an award for future pain and suffering after it had already declared that once there is proof to a medical certainty that respondent has not been exposed to and will not develop the feared disease, any continuing fear is unreasonable as a matter of law?

## LIST OF PARTIES

Petitioner, The Long Island Rail Road Company (LIRR) is a public benefit corporation which is a wholly owned subsidiary of the Metropolitan Transportation Authority, a public authority of the State of New York.

Respondent, John J. Marchica (Marchica), is an individual.

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## PETITION FOR WRIT OF CERTIORARI

This Court recently held that a claim for negligent infliction of emotional distress is cognizable under FELA *(Consolidated Rail Corp. v. Gottshall,* No. 92-1956, 62 U.S.L.W. 4609 (June 24, 1994) (*Gottshall*) (Appendix, *infra,* 25a)) and, in the course of its decision, set forth the general standards emotional distress plaintiffs must meet. The instant case raises an important question of federal law: under what standards may a claim for negligent infliction of emotional distress caused by fear of contracting a disease in the future be deemed cognizable under FELA? There are significant reasons why this Court should resolve the question.

The Second Circuit has rendered a decision affirming a railroad worker's recovery under FELA for mental distress caused by his fear of developing Acquired Immune Deficiency Syndrome (AIDS), despite the fact that he failed to establish that he had been exposed to the disease that he feared. Not only does that decision sharply depart from this Court's mandate in *Gottshall* and elsewhere that emotional distress decisions under FELA be guided by common law principles but it ignores *Gottshall's* mandates concerning unlimited liability.

This Court has recognized that general emotional distress claims demonstrate "subtle and intricate distinctions" (*Atchison, T. & S. F. Ry. Co. v. Buell,* 480 U.S. 557 (1987)) such as those found in fear of disease cases. The Second Circuit's decision represents a substantial departure from the common law, an unwarranted expansion of and conflict with the standards enunciated in *Gottshall* and a manifest disregard of the distinctions referred to in *Buell.* In response to those profound errors that create a potential for an almost unfathomable liability for railroads, this Court should make it clear that exposure to the feared disease is an immutable prerequisite to a mental distress claim based on fear that the disease will occur in the future and that, absent exposure, such a claim is unreasonable and unforeseeable.

In *Marchica v. The Long Island Rail Road,* 31 F.3d 1197 (2d Cir. 1994) (1a), the Second Circuit began its opinion:

> Certain words when directed at a person deliver such a dread message as to strike terror in that person's heart. AIDS, a modern word, less than 20 years old, is accompanied by many myths and misconceptions; it also carries with it in the public's mind such an image of inevitable death as to bring home that terror

(2a).

Ultimately, in its decision, the Second Circuit approved an award for fears based on myth and misconception rather than medical facts of exposure to the feared disease. *Marchica* approved a jury verdict to the respondent who had been pricked by a hypodermic syringe that could not have contained live HIV-virus and who had tested negative for HIV repeatedly over a period of several years prior to the trial. The Court declared that "[b]ecause he suffered a physical impact", respondent was entitled to recover for all injuries, including his emotional distress based on fear of contracting AIDS (13a).

The practical effect of *Marchica* is that in FELA actions, a physical impact, no matter how slight, combined with evidence of genuine emotional distress, subsumes foreseeability, proximate cause and reasonableness, even if the fear is based on myth and misconception rather than medical fact. Therefore, as in *Marchica,* a hypodermic needle prick, incurred while cleaning, repairing or otherwise dealing with a train or other facility associated with railroading, can result in recovery if there is proof of genuine mental distress, even if the plaintiff was never exposed to the disease. Thus, the age old elements of foreseeability, proximate cause and reasonableness incorporated in FELA are

subordinated as a matter of law to a fear that has no basis in medical fact.

The *Marchica* holding departs from the common law as it has developed with respect to the special circumstances of fear of disease cases, and ignores the important policy considerations set forth in this Court's opinion in *Gottshall.* The Second Circuit has, therefore, decided a federal question in contradiction to this Court's instructions and decisions and has departed from the accepted and usual course of judicial proceedings. Because of the potential consequences it has raised to the financial viability of railroads, *Marchica* cries out for consideration by this Court.

## OPINIONS BELOW

The LIRR's motion for partial summary judgment precluding liability was denied by the United States District Court, Eastern District of New York and is reported at *Marchica v. The Long Island Railroad,* 890 F. Supp. 445 (E.D.N.Y. 1993) (72a). At trial, the jury rendered a verdict in favor of respondent, finding LIRR 45% liable and judgment was entered (71a). The opinion sought to be reviewed is the decision of the Court of Appeals for the Second Circuit affirming the jury's verdict, reported at *Marchica v. The Long Island Railroad Company,* 31 F.3d 1197 (2d Cir. 1994) (1a).

## STATEMENT OF JURISDICTION

This Court's jurisdiction to review a post-judgment Order of the Court of Appeals for the Second Circuit affirming a jury verdict under FELA, is invoked pursuant to 28 U.S.C. § 1254(1).

The case was brought in the Eastern District of New York pursuant to FELA. After trial, final judgment was entered (71a) and the LIRR timely appealed to the Second Circuit Court of Appeals under 28 U.S.C. §§ 1291 and 1294.

The Second Circuit affirmed the judgment by opinion dated July 29, 1994 (1a). This Petition for Writ of Certiorari is timely filed within 90 days of that decision.

## STATUTE INVOLVED

The FELA statute in issue is 45 U.S.C. § 51 (91a).

## STATEMENT OF THE CASE

On October 25, 1989, John J. Marchica, a LIRR employee, was attempting to weld shut a sidewalk grate to prevent vagrants from gaining entry through it to the lower level of the LIRR station building in Hempstead, New York. After more than an hour at this task, he decided to remove some fallen leaves, paper and other matter which was cluttering the bottom of the shaft under the grate. He thrust his gloved hand into the debris and was stuck by a hypodermic needle which was in the clutter. The alleged negligence was the LIRR's prior failure to remove the debris.

Despite the fact that he consistently tested negative for HIV-virus over the next two years, in June 1992, Marchica sued under FELA for negligent infliction of emotional distress based upon his claimed fear of contracting AIDS in the future. The LIRR moved for summary judgment contending that since there was no evidence that respondent had been exposed to the HIV-virus, a claim for fear of contracting the disease in the future was not cognizable under FELA. District Court denied summary judgment (72a).

The jury returned a verdict apportioning 55% of the fault to Marchica, 45% to the LIRR and fixing Marchica's damages at $225,000.00 for past emotional distress and $55,000.00 for future emotional distress. Based on the apportionment, judgment was entered on May 4, 1993, in the amount of $126,000.00 (71a).

On appeal, LIRR argued that based upon common law jurisprudence that has evolved in fear of future disease cases, no recovery under FELA could flow from a fear of contracting AIDS in the absence of proof of exposure to HIV-virus. Absent exposure to a disease, a plaintiff's fear of developing a disease is not, as a matter of law and common sense, foreseeable or reasonable. It cannot become the basis for an award under common law principles that this Court instructed lower courts to seek out for guidance.

The LIRR's exposure argument was based on the testimony of Marchica's own medical expert that HIV-virus exposed to the air, even in blood in a syringe, could not survive for more than one-half hour, while Marchica was at the site of the debris and the syringe for at least an hour. Since no HIV-virus could have survived, respondent could not develop AIDS based on his needle stick. Any future emotional distress based on fear of developing AIDS was thus completely irrational and unfounded.

By opinion dated July 29, 1994, the Second Circuit Court of Appeals rejected the LIRR's arguments (1a). Ostensibly relying on *Gottshall*, the Second Circuit found that Marchica had met the "impact/zone of danger test" (12a). With regard to the award for future emotional distress, the court "agree[d]" that the proof showed that respondent could not develop AIDS in the future and that any continuing fear was unreasonable, but affirmed the jury's award for respondent's future emotional distress anyway (23a).

This petition seeks review of that decision which affirmed respondent's recovery under FELA for past and future emotional distress based upon fear of developing a disease to which respondent was never exposed.

## REASONS FOR GRANTING THE WRIT

The Court should grant this petition for a writ of certiorari because:

1) The issue of what circumstances give rise to a cognizable claim for negligent infliction of emotional distress caused by fear of future disease under FELA (and the Jones Act, 46 U.S.C. § 688) is important, will recur, is arising in the Circuits, and should be settled by this Court;

2) The decision below sharply departs from long-standing common law principles and precedents by arbitrarily and improperly dismissing the common law fear of disease jurisprudence as inapplicable; and

3) The decision below conflicts with the applicable precedents of the Court by embracing a standard for recovery which converts FELA into an insurance statute, opens the floodgates to unwarranted fear of disease claims and exposes employers to virtual unlimited liability under FELA and the Jones Act.

The evidence in the Marchica record as well as sound medical information demonstrated that at the time of the needle stick there was no reasonable medical probability of plaintiff contracting AIDS. Nevertheless, the Second Circuit found that where the basis of the emotional distress claim is a physical impact, it is encompassed by FELA, without regard to exposure to the disease, as long as the fear is genuine (13a).

The Second Circuit's focus on physical impact appears to be the result of its embrace of the idea that AIDS is so fearsome that even a fear based on myth and misconception will be recognized as reasonable. To achieve its result, the court first ignored the medical

facts and then mischaracterized the common law fear of disease jurisprudence in order to reject that jurisprudence as "inapposite" (14a). The court simply declared that respondent's "emotional injury was reasonably foreseeable, as it was of the sort that a person in his circumstances would ordinarily experience" (13a); that it "occurred under circumstances that would cause a reasonable person to develop a fear of AIDS" (19a); and that "any reasonable person would have such fear" (21a).

The Second Circuit offered a cursory review of the "vast literature on AIDS" to show that it is commonly known that HIV-virus may be spread by sharing of contaminated needles (21a). But *Marchica* is not a shared needle case where the fragile HIV-virus has been transmitted by drug users who are exchanging blood in the course of sharing use of a needle. This is a case of a needle that had been lying in a debris pile for at least an hour and, by any common sense inference, much longer.

In any event, embracing its shared needle misconception, the court declared:

> [W]e are unable to embrace the notion that a reasonable person, punctured by a discarded hypodermic needle with blood in it, in a location known to be frequented by drug users, exercising due diligence, would not fear developing AIDS. Just the opposite is true; any reasonable person would have such fear.

(20a). Contrary to this declaration, where fear of disease is involved, the law recognizes as a "reasonable person" one who relies on medical information and advice given by physicians, not unreasoned fears. Marchica did not produce his doctor at the trial, no HIV-virus could have survived in the debris, and Marchica tested negative for such virus over a period of three years.

"A reasonable person [must exercise] due diligence" to familiarize himself or herself to the realities of the disease and to accept medical advice given. *In re Hawaii Federal Asbestos Cases,* 734 F. Supp. 1563 (D.C. Ha. 1990); *see Gideon v. Johns-Manville Sales Corp.,* 761 F.2d 1129 (5th Cir. 1985); *Potter v. Firestone Tire & Rubber Co.,* 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993). There can be no reasonable fear of disease where the fear is based on subjective ignorance, assumption or speculation.

The medical facts relative to contracting AIDS were clear at the time of the incident and they are clear now. Although AIDS is ultimately fatal, HIV-virus is fragile. It survives only in the habitat of body fluids and it is difficult to communicate. Curran, Gosten and Clark, *Acquired Immunodeficiency Syndrome: Legal and Regulatory Policy,* Harvard School of Public Health 228 (July 1986). The Surgeon General's Report on AIDS in 1993 asserts that one route of transmission is "using contaminated needles to inject drugs" (at 6). That does not include being accidentally stuck by a discarded needle. The rate of transmission of HIV-virus by accidental needle stick is "extremely low" (*Curran* at 229) and even in healthcare workers is approximately only *0.4%.* Gerberding, "AIDS & The Health Care Provider: Coping with Risks, Fears and Risk Reduction Strategies", *HIV Infection and Disease,* AMA 35 (Ropoza, ed. 1989). In fact, the risk of infection with the Hepatitis B virus from an accidental needle stick is much higher, approximately 6% (NYS Dep't of Health, *Report to Legislature: Pilot Study of Needle Stick Prevention Devices,* 2 (March 1992)) and the rate of developing cancer from asbestos exposure is even higher, 6.7%. Lemen, *Statement Before Subcommittee on Toxic Substances,* Nat. Inst. Occupational Safety & Health, United States Department of Health and Human Services (April 26, 1990).

Thus, a reasonable person who relied on medical advice rather than ignorance would understand that an accidental stick from a

hypodermic needle exposed to the elements in a pile of debris for at least an hour and likely much more, posed virtually no risk of infection to the HIV-virus. The cases regarding accidental needle sticks and fear of AIDS demonstrate that fact. In those cases, not one plaintiff actually became infected with HIV-virus by being stuck by a used needle. *See Burk v. Sage Prods, Inc.*, 747 F. Supp. 285 (E.D. Pa. 1990); *Carroll v. Sisters of St. Francis Health Svcs., Inc.*, 868 S.W.2d 585 (Tenn. 1993); *Kaufman v. Physical Measurements, Inc.*, __ A.D.2d at __, 615 N.Y.S.2d 508 (3d Dep't 1994); *Herbert v. The Regents of the Univ. of Cal.*, 26 Cal. App. 4th 782, 31 Cal. Rptr. 2d 709 (2d Dist. 1994); *Seimon v. Becton Dickinson & Co.*, 91 Ohio App. 3d 323, 632 N.E.2d 603 (1993). Nor did respondent below.

Of course, a reasonable person might have some concern at being stuck by a needle, but "a reasonable person, normally constituted, would . . . be able to cope adequately with the mental distress occasioned by the circumstances". *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (1991), *reh'g en banc*, 954 F.2d 266 (5th Cir. 1992), *cert. denied* ,113 S. Ct. 604 (1992); *In re Hawaii*, 734 F. Supp. 1563; *Potter*, 6 Cal. 4th 965, 863 P.2d at 810, 25 Cal. Rptr. 2d 550; *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982). The standard for negligent infliction of emotional distress is severe emotional distress, not concern. *See, e.g. Baskin v. Hawley*, 807 F.2d 1120 (2d Cir. 1986); *Potter*, 6 Cal. 4th 965, 863 P.2d at 810, 25 Cal. Rptr. 2d 550.

In *Marchica*, the court concluded that: 1) the predominant policy of FELA is to assure liberal recovery for injured employees (9a, 19a); 2) the sole purpose of the fear of disease common law test of exposure is to identify genuine injuries (17a); 3) the common law fear of disease test of exposure is to be discarded when it bars recovery under FELA for genuine distress (18a); and 4) therefore, a claim for negligent infliction of emotional distress based on fear of future disease that is not generally recognized under the common law exists under FELA.

Marchica thus holds that where there is a physical impact and the mental distress has an "indicia of genuineness", the fear has been proximately caused by the impact and is, therefore, foreseeable. In so reasoning, the court equated impact with causation, genuineness with foreseeability and "physical impact/ genuine fear" with recovery. That analysis disregards the carefully drawn, fault-based limitations of the common law in recovery for fear of disease claims.

The court's abandonment of common law strictures was frank. It acknowledged that FELA must be informed by the common law (9a) and that common law fear of disease jurisprudence "generally hold[s] as a prerequisite to recovery for emotional distress that a plaintiff prove actual exposure to a disease and a reasonable medical probability of later developing it" (13a). It concluded, however, that it would not adopt "so rigid an actual exposure test" (18a). Accordingly, after finding that Marchica had sustained a physical impact and that his distress was genuine (13a), the court held that he could recover for his distress based upon fear of developing a disease to which he was never exposed.

*Marchica* reflects factual circumstances that have the likelihood of repeated recurrence. The Second Circuit has radically departed from accepted common law principles and has decided an important question of federal law in conflict with this Court's own recent holding. Until this Court settles the question, the railroad industry faces the prospect of unfathomable liability consequences.

## I.

## THE SECOND CIRCUIT FAILED TO ADHERE TO THIS COURT'S ADMONITION TO GIVE GREAT WEIGHT TO COMMON LAW PRINCIPLES IN DEALING WITH FELA AND CREATED A LIABILITY RULE THAT CONTRADICTS PREVAILING COMMON LAW JURISPRUDENCE AND THIS COURT'S HOLDING IN *GOTTSHALL*.

*Gottshall* reaffirmed that what constitutes negligence under FELA "generally turns on principles of common law" (38a). Although common law principles are not dispositive, they are "entitled to great weight", "play a significant" (39a) and "vital role" in giving content to the scope of FELA and "must inform the availability of a right to recover under FELA for negligently inflicted emotional distress" (47a). The "'merit' of a FELA claim of this type cannot be ascertained without reference to the common law" (47a). In *Marchica*, the Second Circuit acknowledged that the fear of disease cases require that a plaintiff prove actual exposure and a reasonable probability of later developing the feared disease (13a). Holding that the common law principles were "inapposite" (14a), the Second Circuit departed from them. In so doing, the court adopted an utterly expansive approach to FELA liability that contradicted accepted common law canons relating to proximate cause, reasonableness and foreseeability in fear of future disease cases.

"The overwhelming view in the states and federal courts is that for a plaintiff to recover for emotional distress based on a fear of future disease there [must be] an exposure". Garves, "*In Fear-Of-AIDS Cases, Proof is Key Element: Can a Plaintiff Recover Without Actual Exposure to the Disease?*" Nat. L.J. 27 (Apr. 26, 1993); Note, *The Fear of Disease as Compensable Injury: An Analysis of Claims Based on AIDS Phobia*, 67 St. John's L. R. 77,

78 (1993). Fear of future disease jurisprudence relies on special rules because it applies to a special category of emotional distress claims, "a specific type of mental anguish or emotional distress" (*Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 318, *recons. denied en banc*, 797 F.2d 256 (5th Cir. 1986)), not a general fear, but one tied to the specifics of the nature of the disease feared. *In re Hawaii*, 734 F. Supp. 1563. The exposure standard is vital because it places a meaningful limit on liability, ensuring "that there exists a rational, non-speculative basis for the fear of developing the disease". *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871, 888 (1994); *e.g., Nesom v. Tri Hawk International*, 985 F.2d 208 (5th Cir. 1993); *Deleski v. Raymark Industries, Inc.*, 819 F.2d 377 (3d Cir. 1987); *Hagerty*, 788 F.2d 315; *Harper v. Illinois C. G. R.*, 808 F.2d 1139 (5th Cir. 1987); *Gideon*, 761 F.2d 1129; *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271 (3d Cir. 1985); *Landry v. Florida Power & Light Corp.*, 799 F. Supp. 94 (S.D. Fla. 1992), *aff'd*, 998 F.2d 1021 (11th Cir. 1993); *Giammona v. Metro-North Commuter R.*, 750 F. Supp. 662 (S.D.N.Y. 1990); *Burk*, 747 F. Supp. 285; *In re Hawaii*, 734 F. Supp. 1563; *Potter*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 709; *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp.*, 186 W. Va. 424, 413 S.E.2d 79 (1991), *overruled in part on other grounds, Courtney v. Courtney*, 190 W. Va. 126, 437 S.E. 2d 436 (1993); *Ferrara v. Gallucio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996 (1958); *Transamerica Ins. Co. v. Doe*, 173 Ariz. 112, 840 P.2d 288 (1st Dist. 1992); *Bullock v. Newman*, 93 N.C. App. 545, 378 S.E.2d 562 (1989); *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. App. 3d 1985), *review denied*, 492 So. 2d 1331 (1986); *Cathcart v. Keene Industrial Insulation*, 324 Pa. Super. 123, 471 A.2d 493 (1984).

Exposure requires actual impact by the disease or an agent that can cause the disease. *See, e.g., Hagerty*, 788 F.2d 315 (plaintiff doused by diprolene, a carcinogen); *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983) (benzidine, a carcinogen, applied to plaintiff's body); *Plummer v. United States*, 580 F.2d 72 (3d Cir. 1978) (body

harbored tubercle bacilli); *Marriott v. Sedco Forex Int'l Resources*, 827 F. Supp. 59 (D. Ma. 1993) (injection with HIV-infected serum); *Villari v. Terminix International, Inc.*, 663 F. Supp. 727 (E.D. Pa. 1987) (inhalation of carcinogenic pesticides); *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986) (ingestion of water contaminated by carcinogens); *French v. Ralph E. Moore, Inc.*, 203 Mont. 327, 661 P.2d 844 (1983) (inhalation of gasoline fumes); *Lorenc v. Chemirad Corp.*, 37 N.J. 56, 179 A.2d 401 (1962) (ethylene imine burns); *Ferrara*, 5 N.Y.2d 16, 176 N.Y.S.2d 996 (x-ray burns).

The common element in these cases is that there is no actionable injury unless there is proof of actual exposure to an agent that could cause the disease. Where proof of exposure is lacking, proximate cause, reasonableness and foreseeability cannot be established because there is no ground for inferring that the emotional distress was caused by anything attributable to the alleged negligent act.

In asbestos cases, the law demands even more. Of the millions of people who inhale asbestos fibers, only a small percentage will actually suffer any future disease as a result. To recover for fear of cancer because of exposure to asbestos, plaintiffs must show a present physical injury caused by the exposure which could lead to cancer: scarring of lung tissue (*Herber v. Johns-Manville Sales Corp.*, 785 F.2d 79 (3d Cir. 1986); *Gideon*, 761 F.2d 1129; *Giammona*, 750 F. Supp. 662); "pulmonary function abnormalities" or asbestos-related impairment (*In re Hawaii*, 734 F. Supp. 1563; *Wisniewski*, 759 F.2d 271; *Cathcart*, 324 Pa. Super. 123, 471 A.2d 493) or actual asbestosis. *Cole v. Celotex Corp.*, 588 So.2d 376 (La. App. 1991), *aff'd*, 599 So. 2d 1058 (1992); *Jackson v. Johns-Manville Sales Corp.*, 469 So.2d 99 (Miss. 1985), *cert. denied*, 478 U.S. 1022 (1986); *Eagle-Picher*, 481 So.2d 517.

The most recent decision of the Appellate Division in New

York reaffirmed the common law rule. In *Kaufman v. Physical Measurements, Inc.*, __ A.D.2d __, 615 N.Y.S.2d 508 (3d Dep't 1994), a Postal employee was stuck by a protruding hypodermic needle which had been used to draw blood for a physical examination. Noting the "physical injury", the court nevertheless dismissed the case because without proof that plaintiff had been exposed to HIV-virus, recovery for emotional distress for fear of AIDS was speculative and remote. *Kaufman* is the law in New York in fear of AIDS cases based upon needle sticks.

Sweeping away the array of cases that require proof of exposure, the Second Circuit referred to them as "inapposite" (14a) or "inapplicable" (17a) because no "physical injury" occurred (14a; 17a) and "exposure" was used merely to meet the "physical impact/genuine fear" requirement (14a). The genuineness barrier to emotional distress claims was overcome decades ago when intentional infliction of emotional distress was recognized and the judiciary repeatedly declared that juries had the ability to distinguish the real from the feigned. *See, e.g., Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970); *Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970); *Ferrara*, 5 N.Y.S.2d 16, 176 N.Y.S.2d 996. Since juries are able to distinguish the feigned from the genuine, the restrictions the common law has placed on negligent infliction cases flow from the need to limit the otherwise unlimited liability that could result from *genuine* claims of distress. *See Gottshall* (47a). Such limitations restrict both "the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover" (*Gottshall* 47a) for the exact purpose of precluding liability and recovery in claims where the fear is factually genuine, but unreasonable and/or unforeseeable as a matter of law.

The common law exposure requirement in fear of disease cases is not simply, as the Second Circuit would have it, a

substitute method of insuring the "genuineness" of the fear — it is a fundamental element for stating a claim. No matter how genuine the fear, plaintiff may not recover without proof of exposure to the feared disease because, in the absence of such exposure, plaintiff's fear is unreasonable and unforeseeable under common law principles. A battery of cases so holds. *See Nesom*, 985 F.2d at 211 ("a complete failure of proof concerning an essential element"); *Harper*, 808 F.2d at 1140 (no fear of future condition based upon unproven event); *Wisniewski*, 759 F.2d at 274 (plaintiff must allege injuries due to exposure to asbestos to state claim); *Burk*, 747 F. Supp. at 288 (plaintiff cannot show exposure to feared disease); *Neal*, 125 Idaho 617, 873 P.2d at 876 ("no reasonable fear . . . absent proof of actual exposure"); *Cathcart*, 324 Pa. Super. 123, 471 A.2d at 508 (claim not legally cognizable without effect linked to exposure).

The Second Circuit's effort to distinguish the exposure jurisprudence on the basis that there was "no physical injury" is unconvincing (14a; 17a). Analysis of fear of AIDS cases reveals that the reasons stated for disallowance of recovery is not absence of "physical impact" but the fact that there was no proof of exposure to the disease. Thus, there was no recovery in *Burk*, 747 F. Supp. 285 (paramedic stuck by a hypodermic needle); in *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988) (no showing of infection after sexual intercourse with husband infected with HIV-virus from the antihemophilic factor); in *Neal*, 125 Idaho 617, 873 P.2d 871 (wife could not prove that husband or his mistress were HIV-infected); in *Carroll*, 868 S.W.2d 585 (plaintiff stuck by several discarded hypodermic needles); in *Funeral Services*, 413 S.E.2d 79 (mortician used a sterile procedure and no body fluids were exchanged); in *Herbert*, 26 Cal. App. 4th 782, 31 Cal. Rptr. 2d 709 (1994) (mother's fear after son was stuck by needles); in *Seimon*, 91 Ohio App.3d 323, 632 N.E.2d 603 (nurse stuck by needle); in *Kerins v. Hartley*, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172 (2d Dist. 1994) (patient who learned that

surgery had been performed by physician who developed AIDS); in *Hare v. State,* 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't), *appeal denied,* 78 N.Y.2d 859, 575 N.Y.S.2d 455 (1991) (hospital employee bitten by patient rumored to have AIDS); in *Barrett v. Danbury Hosp.,* No. 310046, 1994 Conn. Super. LEXIS 572 (March 3, 1994) (patient sat in blood which stained his clothing); in *Lubowitz v. Albert Einstein Medical Ctr., N.Div.,* 424 Pa. Super. 468, 623 A.2d 3 (1993) (in vitro fertilization took place and donated placental serum later tested HIV-positive); in *Ordway v. County of Suffolk,* 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. 1992) (plaintiff doctor performed surgery on AIDS patients); in *Petri v. Bank of New York Co.,* 153 Misc. 2d 426, 582 N.Y.S.2d 608 (N.Y. Co. 1992) (sex partner failed to reveal infection but relationship had ended); in *Doe v. Doe,* 136 Misc.2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. 1987) (husband had had a homosexual affair).

In *Johnson v. West Va. Univ. Hosp., Inc.,* 186 W.Va. 468, 413 S.E.2d 889 (1991), however, there was exposure and liability for emotional distress based on fear of developing AIDS where the plaintiff was bitten by an AIDS patient who was bleeding from the mouth and had drawn blood from the plaintiff. Nevertheless, it is not the *de minimis* physical impact that constitutes the injury in the fear of AIDS cases. As the court in *Burk v. Sage,* observed,

> [P]laintiff's allegation that the needle stick resulted in a laceration of his hand is not an allegation that plaintiff has been injured by exposure to the AIDS virus; rather, such an allegation merely shows that plaintiff has been injured by exposure to a hypodermic needle.

747 F. Supp. at 288 n.2.

Declining to apply the common law "actual exposure test"

(18a), the Second Circuit cited three other cases which, in its view, evinced a different rule. *Faya v. Almarez*, 329 Md. 435, 620 A.2d 327 (1993), recognized a fear of AIDS claim against a surgeon who concealed his HIV infection from the patient upon whom he had operated. The distinctive feature of *Faya* is the public policy mandating disclosure by the doctor — a brand of informed consent. The physician was under both a common law duty and an American Medical Association obligation to disclose his condition to the patient. In the face of these public policy considerations and the fact that the patient could not know whether there had been an exchange of blood during the operation, the court granted a recovery limited to the brief "window" of time between the point at which the patient learned of the surgeon's infection (and thus the possibility of exposure) and the point at which tests confirmed that the patient had not been infected. At the latter point, of course, there was proof of non-exposure and genuine or not, the fear became unreasonable and furnished no basis for recovery.

Nevertheless, on facts similar to *Faya*, *Kerins*, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172, wholly rejected liability, even for the "window" period, and based its decision on lack of exposure, declaring that in the absence of physical illness, "damages for fear of AIDS may be recovered only if the plaintiff is exposed . . . and the plaintiff's fear stems from a knowledge . . . that it is more likely than not he or she will . . . develop AIDS due to the exposure".

In *Howard v. The Alexandria Hospital*, 429 S.E.2d 22 (Va. 1993), plaintiff underwent surgery in which unsterile instruments were used and, when informed, "experienced an immediate fear of several diseases". *Id.* at 348. The infection specialist treated plaintiff with massive intravenous antibiotics ("to get any germ she might come in contact with" *id.*), injections for pain and frequent blood tests. The surgeon told the plaintiff that he had "big concerns" of infection by HIV, staph, hepatitis and tetanus. One HIV test, six months afterwards was negative. The treatment

caused severe physical reactions and necessitated an extensive recovery period. The court found that there was a physical injury basis for the claim and denied a dismissal motion. Lack of exposure does not appear to have been in issue.

*Marchica* does mention (as a "cf." case) *Poole,* 698 F. Supp. 1367, where the plaintiff failed to state a claim for emotional distress based upon fear of contracting AIDS after sexual intercourse with her husband who had been infected with HIV-virus from the antihemophilic factor supplied by defendant. The court noted that Poole had not shown any injury and, in any case, she had not been infected with HIV-virus. Thus, whether or not her fear was genuine, lack of exposure was the criterion for the dismissal.

It was only in *Castro v. New York Life Insurance Co.,* 153 Misc. 2d 1, 588 N.Y.S.2d 695 (N.Y. Co. 1991), that a court has completely ignored the jurisprudence of exposure in an AIDS case. In *Castro,* a cleaning worker was stuck by a syringe which had been used to draw blood samples for prospective life insurance clients. The court at *nisi prius* refused to dismiss the case holding that, as a matter of law, a needle-stick from a syringe used to draw blood provided a reasonable basis for emotional distress based on fear of AIDS — regardless of any proof of exposure.

Seizing upon *Castro* to assert that the "inconsistent decisional law" warrants adoption of *Castro's* "more flexible view" as being "most consistent with FELA's remedial nature" (19a), the Second Circuit echoed the Third Circuit's position — utterly rejected by this Court (46a) — that "doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA clams". *Gottshall v. Consolidated Rail Corp.,* 988 F.2d 355, 369 (3d Cir. 1993). This Court gave that approach short shrift.

By treating the common-law tests as mere

> arbitrary restrictions to be disregarded if they stand in the way of recovery on "meritorious" FELA claims, the Third Circuit put the cart before the horse: the common law *must* inform the availability of a right to recover under FELA. . . .

*Gottshall* (47a) (emphasis added).

The Second Circuit declared that it "agree[s] that once there is proof to a medical certainty that plaintiff has not been exposed to and will not develop the disease, any continuing fear of developing AIDS is unreasonable" (23a). Nevertheless, despite three years of negative tests, it affirmed respondent's award for future mental anguish based upon its conclusion that respondent had a permanent injury — post traumatic stress disorder.

Also remarkable is the court's failure to discuss other FELA/Jones Act fear of disease cases. All of the FELA/Jones Act cases finding liability involve exposure to the feared disease. Thus, *Marriott*, 827 F. Supp. 59, held that a seaman stated a claim for recovery for emotional distress based on fear of AIDS after being injected with HIV-contaminated serum. *Hagerty*, 788 F.2d 315, involved a seaman doused by diprolene, a cancer-causing toxin, which was absorbed into his skin. The plaintiff was entitled to try to prove to a jury that the exposure created a reasonable medical probability that he would suffer cancer in the future.

Even *Giammona*, 750 F.Supp. 662, a FELA case from the Southern District of New York, was omitted from the Second Circuit's analysis. There, the plaintiff inhaled asbestos during his railroad employment and later claimed fear of future disease upon learning that the asbestos had scarred his lungs and that he had an increased risk of asbestosis and cancer. A cause of action for emotional distress existed under FELA because the scarring of

plaintiff's lungs proved exposure to a contaminant likely to cause cancer. In yet another FELA asbestos case, *Denton v. Southern Ry. Co.*, 854 S.W.2d 885 (Tenn. App.) the court held that plaintiff was entitled to present evidence of his emotional distress from fear of cancer based on asbestosis. In *Amendola v. Kansas C. S. Ry. Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988) the asbestos case was dismissed on the ground that there was no evidence of physical injury and no physical manifestation of emotional distress.

The Second Circuit's repudiation of the common law represents such a departure from accepted principles that this Court should intervene to settle the question of the appropriate standards for recovery under FELA for emotional distress based upon fear of future disease.

## II.

## THE MARCHICA HOLDING HAS THE EFFECT OF CONVERTING FELA INTO AN INSURANCE STATUTE WITH UNFATHOMABLE LIABILITY FOR RAILROADS BASED UPON UNREASONABLE AND UNFORESEEABLE CLAIMS BY EMPLOYEES WITHOUT PROVIDING RAILROADS WITH ANY WAY OF REGULATING THEIR PROCEDURES TO AVOID THAT LIABILITY.

FELA is a broad remedial statute, designed to give railroad workers a federal remedy for injuries caused by the negligence of their employer. *Buell*, 480 U.S. 557; *Urie v. Thompson*, 337 U.S. 163 (1949). Nevertheless, this Court has consistently cautioned that "FELA is not an insurance statute". *Gottshall* (48a); *see Inman v. Baltimore & O. R. Co.*, 361 U.S. 138 (1959); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Ellis v. Union P. R. Co.*, 329 U.S. 649 (1947). Plaintiffs are required to prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation (*Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108 (1963)) and "must in some adequate way establish negligence and causal

connection between this and the injury". *Atchison, T. & S. F. Ry. Co. v. Saxon*, 284 U.S. 458 (1936); *New York C. R. Co. v. Ambrose*, 280 U.S. 486 (1930). In particular, causation, reasonableness and foreseeability are essential elements of a claim for recovery under FELA. *Gallick*, 372 U.S. 108; *Rogers v. Missouri P. R. Co.*, 352 U.S. 500 (1957); *see Gottshall* (38a).

Under Marchica's "physical impact/genuine fear" standard, with traditional causation and foreseeability principles abandoned, every fear of future disease claim will *per se* be permissive of recovery, for in every fear of disease case there is a physical impact of some sort, whether a needle stick, inhalation of particles or ingestion of liquids. Under *Marchica*, a plaintiff subjected to such an impact need only prove some lack of care by the railroad and a genuine fear of a future disease. Thus, despite the admonitions of this Court, the Second Circuit's rule in fear of disease cases has the effect of transforming FELA into an insurance statute for employees.

In *Gottshall*, where the Third Circuit had adopted a two-prong test of genuineness and foreseeability that also approached insurance statute proportions, this Court rejected the approach and explained that

> testing for the "genuineness" of an injury cannot appreciably diminish the possibility of infinite liability. . . . If one takes a broad enough view, *all* consequences of a negligent act, no matter how far removed in time or space, may be foreseen . . . The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

*Gottshall* (48a) (emphasis in original). Limiting legal consequences of a wrong to a controllable degree is not a recent

invention of this Court. It is a common law common sense principle. The New York Court of Appeals has noted that "[l]iability for damages caused by wrong ceases at a point dictated by public policy or common sense". *Ferrara*, 5 N.Y.2d at 22, 176 N.Y.S.2d at 1000. *Gottshall* noted that the common law has consistently restricted recovery for negligent infliction of emotional distress based upon several policy considerations:

> [T]he potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability . . . all continue to give caution to courts. We believe the concerns that underlie the common-law tests, and particularly the fear of unlimited liability, to be well-founded.

(53a).

This Court's strong caution against judicial adoption of standards that encourage "unlimited liability" is particularly appropriate in reviewing this case where the Second Circuit has declared that plaintiff's emotional distress "was reasonably foreseeable in light of the fact that he *may* have been exposed" (15a) (emphasis added). If a plaintiff need only show a "possibility" of exposure to a disease, the "flood of trivial lawsuits" or "fraudulent claims" will not be long delayed.

> To allow someone to recover merely because he fears that he *may* have been exposed to a dangerous substance goes too far. Such circumstances do not provide a sufficient indicia of reliability [and] would open the door to thousands of plaintiffs who claim that they have suffered damages caused by fear of

> possible exposure to some dangerous substance or another without even proof of actual exposure to that danger. The special circumstances which guarantee bona fide and genuine claims are not present when the claimant cannot prove that he has been exposed to an injurious substance.

*Nesom*, 985 F.2d at 211 (emphasis in original).

Concerns relative to "unlimited and unpredictable liability" implicate clear policy considerations in fear of disease jurisprudence. The fear of cancer cases are revealing because they reflect social and judicial policy based on the statistical improbability of developing cancer from exposure to possibly toxic materials. As *Potter*, 6 Cal. 4th 965, 863 F.2d 795, 25 Cal. Rptr. 2d 550, cautioned, given that people are commonly aware of and concerned about the possibility of developing cancer from exposure to carcinogens for example, the possibility of a "flood" of fear of cancer claims which, without any meaningful restrictions, might compromise the availability and affordability of liability insurance for defendants open to toxic liability risks.

Finally and importantly, under FELA, the burden of such unlimited liability flowing from the "physical impact/genuine fear" rule will be borne by public utilities and common carriers and, ultimately, "passed through" to the public in increased fares, decreased services and generally higher costs for the many products transported and delivered by rail. As this Court declared in *Gottshall*, "[i]n the context of claims for intangible harms brought under a negligence statute, we find such an arbitrary result unacceptable" (48a). It should be just as unacceptable in this case.

Furthermore, *Gottshall's* criticism of the Third Circuit's test is particularly apt here. The *Marchica* test has "given [railroads] no

standard against which to regulate their conduct to avoid such claims under such an 'ad hoc' approach" (48a). The *Marchica* rule is so expansive that it opens the door to a flood of claims while providing no measure of instruction as to how railroads are to improve safety to avoid such claims (48a). Considering that thousands of passengers, transients and even the homeless, use the railroads, its platforms and train stations each day, it is not at all clear how railroads can provide their employees with a safe workplace that avoids needle sticks. The unlimited liability without causation or foreseeability implicated by Marchica necessitates that such a "standard" be rejected by this Court.

The asbestos cases are highly relevant to the instant issues because they reflect judicial concern over the prospective magnitude of judicial and social burdens if some physical manifestation of the disease is not required as a condition of compensability. The cases also reflect social and judicial policy based on the statistical improbability of contracting asbestosis or asbestos-related cancer from inhalation of asbestos. *In re Hawaii,* 734 F. Supp. at 1570. Therefore, even where there is a pleural thickening (*Herber,* 785 F.2d 79; *Pollock v. Johns-Manville Sales Corp.,* 686 F. Supp. 489 (D.N.J. 1988)), or other manifestation short of asbestosis itself (*In re Hawaii,* 734 F. Supp. 1563), irrational distress after exposure to asbestos is not enough to warrant recovery although the distress may be genuine and the plaintiff's future uncertain except as a matter of statistics. Despite this additional requirement, in 1990 it was estimated that there were approximately 100,000 asbestos lawsuits pending in the United States where plaintiffs had sustained the requisite physical injury. *Rittenhouse v. St. Regis Hotel,* 149 Misc. 2d 452, 565 N.Y.S.2d 365 (N.Y. Co. 1990), *rev'd in part on other grounds,* 180 A.D.2d 523, 579 N.Y.S.2d 100 (1st Dep't 1992).

Fear of AIDS also involves many millions of people who are in contact with hypodermic needles during the course of blood

tests, transfusions, and even the mundane tasks of cleaning public premises. If contact with a hypodermic needle that cannot have borne live HIV-virus is held to constitute a cognizable basis for severe emotional distress based on the theory that such a fear is reasonable, the door is thrown open to thousands of claims by uninfected persons to whom a needle prick may represent both a basis for genuine fear and an opportunity for monetary fortune. The common law jurisprudence requiring proof of exposure in emotional distress cases based on fear of AIDS is based on sound policy both for the judicial system and society in general. This Court now has the opportunity to settle the question raised by the *Marchica* holding.

## CONCLUSION

For the foregoing reasons, petitioner, the Long Island Rail Road Company, respectfully requests that this Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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**APPENDIX A — *MARCHICA V. THE LONG ISLAND RAILROAD*, NO. 93-7521 (2d CIR. JULY 29, 1994), SECOND CIRCUIT OPINION AFFIRMING JUDGMENT FOR PLAINTIFF**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 773—August Term 1993

(Argued December 8, 1993 Decided: July 29, 1994)

Docket No. 93-7521

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JOHN J. MARCHICA,

*Plaintiff-Appellee,*

—v.—

LONG ISLAND RAILROAD COMPANY,

*Defendant-Appellant.*

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Before:

NEWMAN, *Chief Judge,*
OAKES and CARDAMONE, *Circuit Judges.*

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The Long Island Railroad Company appeals from a judgment entered on May 4, 1993 in the Eastern District of New York (Spatt, J.) awarding plaintiff John J. Marchica $126,000 following a jury verdict holding the

railroad 45 percent liable for plaintiff's injuries under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60.

Affirmed.

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LEON D. LAZER, Melville, New York (Pamela D. Armstrong, Lazer, Aptheker, Feldman, Rosella & Yedid, Melville, New York, of counsel), *for Defendant-Appellant.*

MICHAEL BARASCH, New York, New York (Angelo Busani, Altier & Barasch, New York, New York, of counsel), *for Plaintiff-Appellee.*

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CARDAMONE, *Circuit Judge*:

Certain words when directed at a person deliver such a dread message as to strike terror in that person's heart. AIDS, a modern word, less than 20 years old, is accompanied by many myths and misconceptions; it also carries with it in the public's mind such an image of inevitable death as to bring home that terror. After John J. Marchica's hand was stuck by a discarded hypodermic needle with blood in its syringe, he feared he would develop Acquired Immune Deficiency Syndrome (AIDS). This fear was exacerbated by the fact that Marchica could

not determine who had used the discarded needle and therefore whether or not he had been exposed to the human immunodeficiency virus (HIV), the disease that causes AIDS. The incident occurred when Marchica, then 31-years old, was working as a welder for the Long Island Railroad Company (LIRR, railroad or defendant). Marchica sued the LIRR under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), and the jury found the LIRR partly liable for Marchica's emotional distress. The LIRR now appeals a judgment entered May 4, 1993 in the Eastern District of New York (Spatt, J.) awarding Marchica $126,000.

On this appeal, we must decide whether Marchica's alleged fear of developing AIDS was actionable under FELA, so that his jury award for the railroad's tort of negligent infliction of emotional distress may stand. Because in our view FELA encompasses a cause of action for negligent infliction of emotional distress based on a fear of developing AIDS, and because plaintiff produced sufficient evidence to support the jury's award of damages for this tort, we affirm.

## BACKGROUND

### A. *Facts*

In setting forth the facts found in the trial record, we review them in a light most favorable to plaintiff because he obtained a favorable jury verdict. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1286 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990). Marchica worked as a

welder for the LIRR in 1989. During the fall of that year it was discovered that an open metal grating set over a shaftway at the LIRR's Hempstead station in Nassau County, Long Island, New York was unfastened. The grating could be lifted easily and, when open, gave access to a shaftway leading to a basement window of a trainman's room. Vagrants had opened the grating, crawled through the four foot shaftway, broken the window and gained access to the trainman's room. Drug paraphernalia consisting of hypodermic instruments and crack vials was often found on the floor and in the environs of the Hempstead station, which was reputed to be a center for drugs, illegal aliens and prostitution. In light of this, the railroad wanted the metal grating over the shaftway secured.

Plaintiff, because he was a welder, was dispatched with co-workers on October 25, 1989 to do the job. When the crew began welding the grate, sparks from their acetylene torches fell into the bottom of the shaft and onto an accumulated cover of leaves, paper, glass, and other debris. The debris began to smolder. Marchica volunteered to clear it out, and putting on heavy duty welding gloves to protect his hands from the heat and the glass, went down into the trainman's room and began to push the smoldering debris aside. Unfortunately, and despite the protection of his heavy gloves, a hypodermic needle lying hidden among the pile of refuse, suddenly stabbed plaintiff's hand. Upon turning his hand over he saw a hypodermic needle sticking in the palm of his right hand.

One of plaintiff's co-workers testified he saw blood coming from the puncture wound in Marchica's hand, and

also stated he observed blood in the hypodermic syringe. The co-worker called a supervisor to report the injury and was told to bring Marchica to the nearest hospital, and that plaintiff should report to the LIRR medical department afterwards. Taking the needle, which had been put into a paper bag, plaintiff went to the emergency room of Winthrop University Hospital. There he was advised to have a tetanus and hepatitis shot and to get a test for HIV.

Afterwards, when Marchica reported to the LIRR's medical department, he was told the instructions given him by Winthrop physicians concerning the HIV test were ridiculous and that he should just go home and wash his hands with warm soapy water. Nonetheless, Marchica followed the orders of Winthrop and had an AIDS test a couple of days later. On a return visit to the LIRR medical department several months after the accident, a LIRR physician instructed Marchica to have a repeat HIV test. Without bothering to conduct tests of the needle or the blood that had been observed in the syringe to determine whether these instruments were in any way contaminated, the railroad's medical department as a matter of policy disposed of the hypodermic needle and syringe to prevent the spread of infectious diseases.

Plaintiff was advised by a physician to abstain from having relations with his wife, and to be tested for HIV. He had tests done one month, six months and one year from the date of the October 25, 1989 incident. In November 1989 Marchica began seeing a psychologist because he was having difficulty sleeping, experiencing nightmares, and suffering from irritability. His wife and

co-workers observed him on different occasions crying and vomiting. One co-worker estimated that plaintiff lost 30 pounds following his injury. After approximately one month of treatment, he was referred to a psychiatrist who prescribed several anti-depressants. During the course of his treatment Marchica learned that the second HIV test taken in May 1990 was negative. His final blood test taken two years later was also negative.

B. *Prior Proceedings*

In June 1992 plaintiff brought suit against the LIRR pursuant to FELA, alleging that the railroad was negligent in failing to provide him with a safe place to work, and more particularly in failing to maintain the premises at the Hempstead Railroad Station in a reasonably safe condition, and that its negligence caused both the physical and psychological injuries he sustained. The railroad moved for summary judgment, declaring there was no evidence that plaintiff was exposed to the HIV virus or was infected with it. The district court denied defendant's motion.

After acknowledging that there was no authority in point, the trial court held that "FELA does encompass a cause of action for fear of contracting the AIDS virus where the basis of the claim is a documented physical injury sustained by the plaintiff." *Marchica v. Long Island R.R.*, 810 F. Supp. 445, 449 (E.D.N.Y. 1993). The case therefore proceeded to trial. Under the rule it adopted when it denied the LIRR's motion for summary judgment, the trial court allowed the jury to determine causation and

damages, placing no limit on the time a plaintiff's fear is reasonable. The jury returned a verdict finding plaintiff 55 percent culpable, the LIRR 45 percent culpable, and awarding plaintiff $225,000 for past pain, suffering and emotional distress, and $55,000 for future damages. Because defendant was 45 percent culpable for the total jury award of $280,000, judgment was taken against it for $126,000. From this judgment the railroad appeals.

## DISCUSSION

On appeal the LIRR argues, first, that the district court erroneously permitted recovery for past and future emotional distress because under a proper legal standard, fear of developing AIDS would be unreasonable as a matter of law when plaintiff has not proven exposure to the disease. It advocates a rule that would require a plaintiff to prove exposure plus a reasonable medical probability of developing the disease in order to recover for the mental distress associated with the fear of developing AIDS. Under such a standard, the LIRR contends, plaintiff should not have been allowed to recover for his fear of developing AIDS because the testimony revealed to a medical certainty plaintiff was not exposed to the HIV virus.

Second, defendant contends Marchica failed to inform himself as to how HIV is transmitted. It advocates a "due diligence" requirement under which a plaintiff must seek information and become familiar with the realities of the disease in order to ensure that the fear is objectively rational.

The LIRR urges, third, that even if exposure is not a requirement to state a claim for negligent infliction of emotional distress under FELA based on a fear of developing AIDS, recovery should be limited to the time between the possible exposure and when the plaintiff could have learned to a medical certainty that he had not been exposed or would not develop the disease. In the following discussion we deal with the points defendant raises.

## I Common Law Cases Delineate Bounds of FELA Recovery

Congress enacted FELA so that railroad employees who were injured due to the negligence of their employer or of a co-worker would have a remedy. The remedy was intended to be broad and Congress prohibited employers subject to liability under the Act from limiting that liability through contract or otherwise. *See Atchison, T. & S.F. R.R. v. Buell*, 480 U.S. 557, 561 (1987). Section 1 of FELA provides in part:

> Every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of [the carrier] . . . .

45 U.S.C. § 51 (1988). In order to recover under FELA, a plaintiff must prove (1) he or she sustained an injury, (2) while employed by a carrier engaged in interstate commerce, (3) due to the carrier's negligence, and (4) that

such negligence played a role in plaintiff's injury. The employment and negligence requirements of FELA need no discussion. We turn to whether plaintiff who failed to prove exposure to AIDS suffered an actionable injury. Because the scope of FELA is a legal issue, our review of the district court's conclusion that emotional distress is a cognizable injury under that statute is *de novo*. *See Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46, 48 (2d Cir. 1994), *petition for cert. filed* (May 27, 1994).

FELA admits of a broader recovery than may be obtained under common law negligence. Because, as the Supreme Court instructs, FELA is remedial in nature, it has been liberally construed to effectuate Congress' objectives. *See Buell*, 480 U.S. at 562. Those objectives were to remove the traditional defenses to tort liability and to allow recovery in meritorious cases. *Id.* at 561. With this aim in mind, federal courts, informed by common law principles, delineate the bounds of recovery under FELA. *See id.* at 568. We turn then to examine common law principles respecting emotional harm.

### A. *Common Law Principles Recognizing Tort of Negligent Infliction of Emotional Distress*

It has long been accepted by scholarly writers that if a negligent actor's conduct results in a physical injury for which there is liability, the actor is also liable for whatever emotional harm stems from the physical injury. *See* Restatement (Second) of Torts § 456 (1965). One kind of emotional harm for which recovery may be had is a plaintiff's apprehension as to the effects of the physical injury received. *See Prosser and Keeton on the Law of Torts*

§ 54, at 362-63 (W. Page Keeton et al. eds., 5th ed. 1984). Further, recovery for emotional harm does not depend on the seriousness or extent of the initial physical injury. *See, e.g., Borras v. Sea-Land Serv., Inc.*, 586 F.2d 881, 885 (1st Cir. 1978) (defendant liable for unforeseeable emotional disturbance resulting from the tortious conduct resulting from throwing spoon at plaintiff which caused but minor bodily harm). A majority of states now recognize a separate cause of action for negligent infliction of emotional distress. *See Buell*, 480 U.S. at 569 & n.20.

1. *Physical Impact.* At first, common law cases in state courts permitted recovery for emotional harm only when the plaintiff suffered a physical injury or impact that led to the emotional distress. Some states still insist on that requirement. *See, e.g., Howard v. Alexandria Hosp.*, 429 S.E.2d 22, 24-25 (Va. 1993) (plaintiff operated on with unsterile instruments made out *prima facie* case of physical injury sufficient to support a claim of emotional distress for fear of developing AIDS where her body was invaded by intravenous tubes and needles giving pain relief and by instruments withdrawing blood); *Bodine v. Federal Kemper Life Assurance Co.*, 912 F.2d 1373, 1376 (11th Cir. 1990) (Florida law generally requires plaintiff suffer physical impact to recover for negligent infliction of emotional distress), *cert. denied*, 449 U.S. 905 (1991). But, even in those states, it takes very little trauma to justify recovery for the tort of negligent infliction of emotional distress. *See, e.g., Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980) (plaintiff's exposure to x-rays was sufficient physical contact to support a claim of emotional distress). And, in the majority of jurisdictions the physi-

cal injury or impact test has been discarded and recovery is now permitted in a broader range of circumstances.

2. *Zone of Danger.* In place of a physical injury requirement, some states apply a zone of danger test, allowing recovery where plaintiff has been *threatened* with physical injury by the defendant's conduct, and was in reasonable fear of injury, whether or not the plaintiff was actually impacted or suffered such physical injury. *See, e.g., Kimelman v. Colorado Springs*, 775 P.2d 51, 52 (Colo. Ct. App. 1988) (denying recovery for emotional distress to plaintiffs who saw family member's casket fall headlong into grave, because they were not in the zone of danger), *cert. denied*, 493 U.S. 981 (1989); *Farrall v. Armstrong Cork Co.*, 457 A.2d 763 (Del. Super. Ct. 1983); *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1 (Ill. 1983).

3. *Bystander Test.* The bystander test, a variation on the zone of danger test, is followed in some jurisdictions and permits a plaintiff witnessing the death or severe injury to a family member to recover, even though not in the zone of physical danger. *See, e.g., Dillon v. Legg*, 441 P.2d 912, 915-16, 920-21 & n.5 (Cal. 1968) (mother could recover for emotional distress caused by witnessing death of daughter even though there was no physical impact and she was not in the zone of physical danger).

4. *Manifestation of Physical Injury.* The common law of other states imposes a more expansive physical manifestation test, granting recovery when the plaintiff's emotional injury is severe enough to manifest itself in a physical injury. *See, e.g., Stites v. Sundstrand Heat Trans-*

*fer, Inc.*, 660 F. Supp. 1516, 1526 (W.D. Mich. 1987) (under Michigan law plaintiff seeking recovery for fear of cancer must show that the "emotional distress has manifested itself in definite and objective physical injury").

5. *Foreseeability Test.* A minority of states have done away with all formal tests and allow recovery for severe mental distress that was reasonably foreseeable. *See, e.g., In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1568 (D. Haw. 1990) (Hawaii law limits claims for negligent infliction of emotional distress to actions that would foreseeably inflict serious emotional distress on the reasonable person); *Dempsey v. National Enquirer*, 702 F. Supp. 927, 930 (D. Me. 1988) (no recovery in suit against tabloid because not reasonably foreseeable that publication would cause plaintiff severe emotional distress).

The Supreme Court recently held that causes of action for negligent infliction of emotional distress are cognizable under FELA. *See Consolidated Rail Corp. v. Gottshall*, No. 92-1956, 62 U.S.L.W. 4609, 4614 (U.S. June 24, 1994). But the Court limited recovery to those plaintiffs who meet the common law zone of danger test, that is, "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 4613-14. It reasoned that this test best reconciled the state common law cases limiting potential liability with the remedial objectives of the federal statute. *See id.* at 4615. Under this test, "[r]ailroad employees thus will be able to recover for injuries—phys-

ical and emotional—caused by the negligent conduct of their employers that threatens them imminently with physical impact." *Id.* at 4616.

We believe Marchica's claim meets this test. He sustained a puncture wound from a discarded hypodermic needle as a result of LIRR's negligent conduct. Because he suffered a physical impact, Marchica is entitled to receive compensation for all injuries—physical and emotional—proximately caused by the physical impact. Further, his emotional distress manifested itself physically in post traumatic stress disorder, accompanied by sleeplessness, weight loss, vomiting, rashes and anxiety, shortly after he sustained the physical impact. And his emotional injury was reasonably foreseeable, as it was of the sort that a person in his circumstances would ordinarily experience.

B. *Common Law Fear-of-Developing-Disease Cases*

1. *In General.* In its first challenge to the judgment, the railroad asserts the traditional negligent infliction of emotional distress analysis is inappropriate, and urges us instead to follow the specific jurisprudence employed in fear-of-developing-disease cases. Those cases generally hold as a prerequisite to recovery for emotional distress that a plaintiff prove actual exposure to a disease and a reasonable medical probability of later developing it. *See, e.g., Harper v. Illinois Cent. G. R.R.*, 808 F.2d 1139, 1140 (5th Cir. 1987) (per curiam) (no recovery under Louisiana law for mental anguish based on fear of future health problems absent evidence of exposure to chemicals).

Some courts also require a plaintiff to show the exposure caused a present injury, and that future injury is reasonably certain to occur, or that the emotional distress suffered by plaintiff manifested itself physically. *See, e.g., Bubash v. Philadelphia Elec. Co.*, 717 F. Supp. 297, 300 (M.D. Pa. 1989) (worker who briefly had been exposed to low level radiation did not suffer physical injury entitling him to compensation for emotional distress under Pennsylvania law); *DeStories v. Phoenix*, 744 P.2d 705, 709 (Ariz. Ct. App. 1987) (no recovery to plaintiffs who had been exposed to asbestos dust absent physical injury or illness, or physical harm resulting from the emotional distress).

2. *Inapplicable where Physical Injury Present.* Yet, as is made clear in a case heavily relied upon by defendant, the fear-of-future-disease analysis applies only "[w]ith respect to infliction of emotional distress absent physical injury or contact." *Nesom v. Tri Hawk Int'l*, 985 F.2d 208, 210 (5th Cir. 1993) (applying Louisiana law in fear of contracting a disease case).

Proof of exposure to a contaminated substance, or exposure plus manifestation of emotional distress or probable future injury, are substitute means for providing a guarantee of the merits of a plaintiff's claim, where no physical injury has been incurred. *See id.* at 210-11 (denying recovery absent proof of exposure to disease causing agent because "[s]uch circumstances do not provide a sufficient indicia of reliability"). Since Marchica suffered an actual physical injury, the rule governing fear of future disease is inapposite and the traditional negligent infliction of emotional distress analysis applies.

Had Marchica merely touched the discarded needle and become concerned about the possibility of developing AIDS, the case would stand on a very different footing. But because Marchica's emotional distress was the direct result of a documented physical injury and was reasonably foreseeable in light of the fact that he may have been exposed to HIV by way of the needle puncture, he was not required to prove actual exposure to the disease in order to state a viable cause of action. While the jury was entitled to consider the lack of proof of exposure in ascertaining whether Marchica's fear was reasonable, the lack of such proof did not entitle defendant to judgment as a matter of law.

C. *Fear-of-Developing-AIDS Cases*

1. *Actual Exposure.* We now pass to the fear-of-developing-AIDS cases. We recognize that in the recent wave of emotional distress cases based on a fear of developing AIDS, several courts have, as in other fear of developing disease cases, required plaintiff to prove actual exposure to the disease as a prerequisite to recovery. Again, these cases are distinguishable primarily because plaintiffs did not suffer a physical injury. *See Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991) (no recovery to mortician who touched HIV-infected decedent without proof of actual exposure to disease), *overruled in part on other grounds by, Courtney v. Courtney*, 437 S.E.2d 436 (W. Va. 1993); *Neal v. Neal*, No. 20770, 1994 WL 142106 (Idaho April 22, 1994) (absent proof that husband or his mistress was HIV-infected, no recovery for plaintiff-wife for emotional dis-

tress based on fear of developing AIDS where plaintiff's husband had an affair); *Ordway v. County of Suffolk*, 154 Misc.2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. 1992) (no recovery for doctor who performed surgery on AIDS infected patient where no proof of channel of transmission and no allegation of physical injury); *Doe v. Doe*, 136 Misc.2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. 1987) (no recovery for wife in suit against husband who had homosexual affair where no proof of exposure to HIV virus). *But cf. Johnson v. West Va. Univ. Hosps., Inc.*, 413 S.E.2d 889 (W. Va. 1991) (damages for emotional distress based on fear of developing AIDS recoverable against hospital where plaintiff bitten by AIDS-infected patient because plaintiff able to prove physical injury and actual exposure).

2. *Actual Exposure Plus Likelihood of Developing AIDS*. Even where exposure was shown to exist, recovery was precluded in a number of cases because the actual likelihood of developing AIDS was remote. Again, in none of these cases did plaintiffs—unlike the instant plaintiff—suffer a precipitating physical injury. *See Petri v. Bank of New York Co.*, 153 Misc.2d 426, 582 N.Y.S.2d 608 (Sup. Ct. 1992) (mere exposure to AIDS from intercourse with infected partner insufficient to provide rational, non-speculative basis for fear of developing the disease because no proof of physical injury); *Lubowitz v. Albert Einstein Medical Ctr., N. Div.*, 623 A.2d 3 (Pa. Super. Ct. 1993) (no cause of action for fear of developing AIDS where in vitro fertilization took place in donated placental serum later testing HIV-positive, where when re-tested donor's blood proved negative and plain-

tiff had not alleged physical injury); *cf. Transamerica Ins. Co. v. Doe*, 840 P.2d 288 (Ariz. Ct. App. 1992) (no recovery despite actual exposure to HIV virus, where no evidence of resulting physical injury).

After examining these cases, we are unable to agree with defendant that there is a common law rule in fear-of-developing-AIDS cases that proof of exposure and a medical likelihood of developing the disease is required in all circumstances. Rather, the common law rule to be gleaned is the same as it is with the other fear-of-developing-disease cases, that is to say, the exposure requirement—plus actual likelihood of developing the disease—simply is a means of ensuring the genuineness of the claim in situations where the plaintiff would not be able to satisfy the traditional tests of genuineness in negligent-infliction-of-emotional-distress cases. Because Marchica satisfies the traditional zone of danger test adopted by the Supreme Court in the FELA context, these fear-of-developing-AIDS cases are inapplicable.

3. *Injury Plus Exposure*. The railroad points in addition to a handful of fear-of-developing-AIDS cases where recovery was denied even though plaintiff suffered a precipitating injury, because there was no proof of actual exposure to the HIV virus. These cases held that emotional distress was unreasonable as a matter of law, absent proof of exposure. *See Burk v. Sage Prods., Inc.*, 747 F. Supp. 285 (E.D. Pa. 1990) (no recovery for paramedic pricked by hypodermic needle where user of needle unknown and therefore exposure to HIV not proven); *Hare v. State*, 173 AD2d 523, 570 N.Y.S.2d 125 (2d

Dept.) (hospital employee bitten by patient rumored to have AIDS could not recover emotional distress damages for fear of AIDS because no proof of actual exposure), *appeal denied*, 78 NY2d 859, 575 N.Y.S.2d 455 (1991); *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, 868 S.W.2d 585 (Tenn. 1993) (plaintiff stuck by several discarded hypodermic needles could not recover for emotional distress damages on fear of developing AIDS because unable to prove exposure to HIV virus).

But not all courts have applied so rigid an actual exposure test and we decline to do so. Some courts only require plaintiff to allege a specific incident of possible exposure that could lead to a reasonable fear of developing AIDS. *See Faya v. Almaraz*, 620 A.2d 327 (Md. 1993) (patients operated on by surgeon with AIDS could recover for mental distress though unable to prove actual exposure); *Castro v. New York Life Ins. Co.*, 153 Misc.2d 1, 588 N.Y.S.2d 695 (Sup. Ct. 1991) (recovery for negligent infliction of emotional distress based on fear of developing AIDS after needle prick by discarded hypodermic needle allowed where claim tied to a distinct event that would cause a reasonable person to develop a fear of AIDS); *Howard*, 429 S.E.2d at 24-25 (plaintiff operated on with unsterile instruments and later treated intravenously, given pain shots and frequent blood tests established *prima facie* case of injury sufficient to support a claim of emotional distress based on a fear of developing AIDS, though no proof of exposure and no injuries as a result of the use of the instruments); *cf. Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988) (plaintiff whose hemophiliac husband contracted AIDS

from defendants' antihemophilic factor, alleged facts sufficient to place her in the zone of danger, but did not state cause of action under Illinois law, because she did not allege a physical injury or illness resulting from the emotional distress).

It is quite apparent from the recitation of the inconsistent decisional law that this area of the law is in a developing stage. In any event, the scope of FELA is "a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws." *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Although we are not bound by common law principles, they must be accorded weight in our analysis. *See Gottshall*, 62 U.S.L.W. at 4612. We adopt the approach of those cases just discussed which take a more flexible view because they are most consistent with FELA's remedial nature. Thus, a FELA plaintiff who has suffered a physical impact may recover for a fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS. The circumstances surrounding Marchica's puncture wound fulfill these requirements, and therefore his claim is cognizable.

## II Due Diligence

The second point defendant makes is that where a claim of emotional distress is founded on the fear of developing a disease, the plaintiff must exercise due diligence to become familiar with the realities of the disease and defendant should not be held liable for emotional distress

to the extent the plaintiff's fear is based on ignorance. Had Marchica educated himself about HIV and AIDS, defendant insists, he would not have had a rational basis for his fear.

In support of its due diligence argument defendant cites two cases, *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985), and *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990). In *Gideon*, the court explained that under Texas law, "failure to secure medical treatment bars recovery of those damages that would have been averted had proper treatment been obtained or had medical advice been followed." 761 F.2d at 1139. While this ruling is unremarkable as a general principle of law, it does not apply to the present case. Plaintiff sought medical treatment immediately after the puncture wound, and followed the medical advice of more than one physician that he be tested for HIV.

*In re Hawaii* applied Hawaii's reasonable person standard for recovery of emotional distress and held that plaintiffs' fear of cancer following exposure to asbestos would not be reasonable absent knowledge that the exposure had caused a functional impairment. *See* 734 F. Supp. at 1569-70. The court went on to state: "A reasonable person, exercising due diligence, should know that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment . . . ." *Id.* at 1570. Again, we agree with the general proposition that a plaintiff may only recover for damages proximately caused by a defendant's breach of duty. But we are unable to embrace the notion that a reasonable person, punctured by a discarded hypodermic needle with blood in it, in a loca-

tion known to be frequented by drug users, exercising due diligence, would not fear developing AIDS. Just the opposite is true; any reasonable person would have such fear.

In the vast literature on AIDS it is repeatedly stated that HIV is spread by the blood or bodily fluids of one person being transmitted to another, and that the sharing of needles is a means of transmission. *See, e.g.*, John K. Watters et al., *Syringe and Needle Exchange as HIV/AIDS Prevention for Injection Drug Users*, 271 J. Am. Med. Ass'n 115 (1994) ("sharing of contaminated injection paraphernalia is a major route for transmission of [HIV] in the United States"); M. Levy et al., *Improper Infection-Control Practices During Employee Vaccination Programs—1993*, 271 J. Am. Med. Ass'n 182 (1994) ("patient-to-patient transmission of HIV has occurred when needles and syringes were reused without being properly sterilized or were inadvertently reused between patients"); Geoffrey Cowley, *AIDS Without Needles or Sex*, Newsweek, Dec. 20, 1993, at 106 ("most of us can recite the truism that HIV spreads through sex and shared needles"); Geralyn M. Franklin et al., *AIDS in the workplace: current practices and critical issues; acquired immune deficiency syndrome*, 30 J. Small Bus. Mgmt. 61 (1992) ("the virus is predominantly spread through sexual contact and through the sharing of contaminated needles and syringes by intravenous drug users").

Evidence presented to the jury revealed that Marchica was advised to be tested for HIV, and even the LIRR medical department considered the needle that punctured Marchica's palm to be infectious. Plaintiff's medical

expert on HIV and AIDS testified that the medical community was still exploring precisely how the virus is transmitted and, he added, that in his opinion the disease could be transmitted through a needle that has been used and discarded. From this evidence the jury was entitled to find there was a rational basis for plaintiff's fear of developing AIDS.

Moreover, in the FELA context the traditional concept of proximate cause is supplanted by the less stringent standard that there be some causal relation, no matter how slight, between the injury and the railroad's breach of duty. *See Gallick v. Baltimore & O. R.R.*, 372 U.S. 108, 116 (1963). The plaintiff only need show that the employer played a part in bringing about the injury. *See Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). Under FELA the right of the jury to decide the issue of causation must be "most liberally viewed." *See, e.g., Eaton v. Long Island R.R.*, 398 F.2d 738, 741 (2d Cir. 1968). Hence, Marchica presented sufficient evidence to create a jury question under FELA as to whether LIRR's negligence played a part in bringing about his physical and emotional injuries.

III Future Emotional Distress

As its last point, the railroad declares the jury's $55,000 award for future damages has no basis in the record. Specifically, it contends that it is unreasonable as a matter of law for a plaintiff to fear developing AIDS after a point in time when there is proof to a medical certainty

that he has not been exposed to, nor will he contract the disease. In other words, recovery should be limited to the period from the time of possible exposure to that point when plaintiff knew he was not exposed to HIV. Since at the time of trial Marchica had tested negative for HIV three times over a period of three years, any continuing emotional distress stemming from a fear of developing AIDS, the LIRR maintains, would be unreasonable as a matter of law.

We agree that once there is proof to a medical certainty that plaintiff has not been exposed to and will not develop the disease, any continuing fear of developing AIDS is unreasonable. *Accord Faya*, 620 A.2d at 337. But we are unable to say on this record that there was no basis for the jury to award $55,000 for future emotional distress. A FELA plaintiff is entitled to recover for all past, present and probable future harm attributable to the defendant's tortious conduct, including pain and suffering and mental anguish. *See, e.g., Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 317, *modified*, 797 F.2d 256 (5th Cir. 1986). The trial judge instructed the jury that only if it found any of plaintiff's injuries were permanent could it award compensation for future emotional distress and future loss of enjoyment of life.

Marchica presented evidence showing that he developed post traumatic stress disorder soon after he suffered the puncture wound, and that he would continue suffering from the disorder and the accompanying symptoms of weight loss, vomiting, rashes, and tachycardia for the rest of his life. Dr. J. David Gassman, plaintiff's expert in psychology testified, for example, that post traumatic stress

disorder is a permanent, recurring phenomenon, and that the symptoms would occur throughout Marchica's life. This and other evidence in the record provided an ample basis for the jury's award of $55,000 for future emotional distress.

## CONCLUSION

For the reasons stated therefore the judgment of the district court is affirmed.

## APPENDIX B — *CONSOLIDATED RAIL CORP. V. GOTTSHALL*, NO. 92-1956, 62 U.S.L.W. 4609 (U.S. JUNE 24, 1994), SUPREME COURT OPINION HOLDING THAT NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS ARE COGNIZABLE UNDER FELA

No. 92-1956

CONSOLIDATED RAIL CORPORATION,
PETITIONER v. JAMES E. GOTTSHALL

CONSOLIDATED RAIL CORPORATION,
PETITIONER v. ALAN CARLISLE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Syllabus

No. 92-1956. Argued February 28, 1994—
Decided June 24, 1994*

In separate suits against petitioner Conrail, their former employer, respondents Gottshall and Carlisle each asserted a claim for negligent infliction of emotional distress under the Federal Employers' Liability Act (FELA). In *Gotshall*, the District Court granted summary judgment to Conrail. In reversing and remanding for trial, the Court of Appeals observed that most States limit recovery for negligent infliction of emotional distress through the application of one or more common-law tests. The court declared, however, that there is a fundamental tension between such restrictive tests and FELA's liberal recovery policy, and stated that the tests must be discarded when they bar recovery on

* Together with *Consolidated Rail Corporation v. Carlisle*, also on certiorari to the same court.

"meritorious" FELA claims. The court held that the facts alleged in support of a FELA claim must provide a threshold assurance that there is a likelihood of genuine and serious emotional injury, and concluded that Gottshall had satisfied this threshold "genuineness" test and adequately alleged the usual FELA elements, including conduct unreasonable in the face of a foreseeable risk of harm. In *Carlisle,* the same court sustained a jury verdict against Conrail, "uphold[ing] for the first time a claim under the FELA for negligent infliction of emotional distress arising from work-related stress." Although it restated its *Gottshall* holding, the court shifted its primary emphasis to the foreseeability of the alleged injury and held, *inter alia,* that Carlisle had produced sufficient evidence that his nervous breakdown had been foreseeable to Conrail.

*Held:*

1. The proper standard for evaluating FELA claims for negligent infliction of emotional distress must be derived from FELA principles and relevant common-law doctrine.

(a) This Court's FELA jurisprudence outlines the proper analysis for determining whether, and to what extent, a new category of claims should be cognizable under the statute. First, the language, purposes, and background of the statute, along with the construction given to the statute by this Court, must be examined. Second, because FELA jurisprudence gleans guidance from common-law developments, the common law's treatment of the asserted right of recovery must be considered. See, *e.g., Atchison, T. & S. F. R. Co. v. Buell,* 480 U.S. 557, 561-562, 568-570.

(b) Through FELA, Congress sought to compensate

employee "injury" resulting from employer "negligence," 45 U.S.C. §51, by creating a remedy for the many deaths and maimings that were occurring on interstate railroads at the time the statute was enacted in 1908, see *Urie v. Thompson*, 337 U.S. 163, 181. Over the years, the Court has construed FELA liberally to further this remedial goal, see, *e.g.*, *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506. Nevertheless, the federal question of what constitutes negligence for purposes of FELA turns upon common-law principles, subject to such modifications as Congress has imported into those principles in the statute itself. See *Urie, supra*, at 182. Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in the Court's decision.

(c) Although nearly all States recognize a right to recover for negligently inflicted emotional distress — that is, mental or emotional harm (such as fright or anxiety) that is caused by another's negligence and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms — three major common-law "tests" have been developed to limit that right: (1) the "physical impact test," which had been embraced by most of the major industrial States by 1908, but has since been abandoned in all but a few jurisdictions; (2) the "zone of danger" test, which had been adopted by several States by 1908 and currently is followed in 14 jurisdictions; and (3) the "relative bystander" test, which was first enunciated in 1968 and has since been adopted by nearly half the States.

2. The Court of Appeals applied an erroneous standard for evaluating FELA claims for negligent infliction of emotional distress.

(a) The lower court correctly held that such claims are

cognizable under the statute. As part of its duty to use reasonable care in furnishing employees a safe workplace, *Buell, supra,* at 558, a railroad has a FELA duty to avoid subjecting its workers to negligently inflicted emotional injury. A right to recover for such injury was widely recognized when FELA was enacted and is nearly universally recognized today. Moreover, given the broad remedial scope this Court has accorded FELA's "injury" term, cf. *Urie, supra,* at 181, there is no reason why that term should not encompass emotional injury.

(b) However, the Court of Appeals' standard for delimiting this FELA duty is rejected. First, because the merit of this type of FELA claim cannot be ascertained without reference to the common law, the court erred in treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on "meritorious" FELA claims. Second, the viability of the court's "genuineness" test is questionable on its own terms, since it cannot appreciably diminish the possibility of unlimited liability for *genuine* claims of emotional harm, and since it would force judges to make highly subjective determinations concerning the authenticity of particular claims. Third, the court's reliance on foreseeability as a meaningful limitation on liability is misplaced, since *all* consequences of a negligent act, no matter how far removed, may be foreseen. Finally, the common law does not support the court's unprecedented *Carlisle* holding, which would impose a duty to avoid creating a stressful work environment, and thereby dramatically expand employers' FELA liability to cover the stresses and strains of everyday employment.

(c) Instead, this Court adopts the zone of danger test, which limits recovery for emotional injury to those plaintiffs who either sustain a physical impact as a result of the defendant's negligence or are placed in immediate risk of physical impact by that negligence. This is the only common-law test that exhibits

both significant historical support and continuing vitality sufficient to inform the Court's determination of the federal question of what constitutes FELA "negligence" in this context. This test is consistent with FELA's broad remedial goals and with the statute's purpose of alleviating the physical dangers of railroading. Even if respondents are correct that the zone of danger test arbitrarily excludes some emotional injury claims, that test best reconciles the concerns motivating the common-law restrictions on recovery for negligently inflicted emotional distress — the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult to detect, and the specter of unlimited and unpredictable liability — with this Court's FELA jurisprudence.

3. The question whether Gottshall satisfies the zone of danger test was not adequately briefed or argued before this Court, and should be considered by the Court of Appeals on remand. In *Carlisle,* however, judgment must be entered for Conrail on remand, because Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger. 988 F.2d 355 (first case) and 990 F.2d 90 (second case), reversed and remanded.

Thomas, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Scalia, Kennedy, and Souter, JJ., joined. Souter, J., filed a concurring opinion. Ginsburg, J., filed a dissenting opinion, in which Blackmun and Stevens, JJ., joined.

Justice Thomas delivered the opinion of the Court.

These cases require us to determine the proper standard for evaluating claims for negligent infliction of emotional distress that are brought under the Federal Employers' Liability Act. Because

the standard adopted by the Court of Appeals is inconsistent with the principles embodied in the statute and with relevant common-law doctrine, we reverse the judgments below.

I

Respondents James Gottshall and Alan Carlisle each brought suit under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U.S.C. §§51-60, against their former employer, petitioner Consolidated Rail Corporation (Conrail). We set forth the facts of each case in turn.

A

Gottshall was a member of a Conrail work crew assigned to replace a stretch of defective track on an extremely hot and humid day. The crew was under time pressure, and so the men were discouraged from taking scheduled breaks. They were, however, allowed to obtain water as needed. Two and one-half hours into the job, a worker named Richard Johns, a longtime friend of Gottshall, collapsed. Gottshall and several others rushed to help Johns, who was pale and sweating profusely. They were able to revive him by administering a cold compress. Michael Norvick, the crew supervisor, then ordered the men to stop assisting Johns and to return to work. Five minutes later, Gottshall again went to Johns' aid after seeing his friend stand up and collapse. Realizing that Johns was having a heart attack, Gottshall began cardiopulmonary resuscitation. He continued the process for 40 minutes.

Meanwhile, Norvick attempted to summon assistance, but found that his radio was inoperative; unbeknownst to him, Conrail had temporarily taken the nearest base station off the air for repairs. Norvick drove off to get help, but by the time he returned

with paramedics, Johns had died. The paramedics covered the body with a sheet, ordered that it remain undisturbed until the coroner could examine it, and directed the crew not to leave until the coroner had arrived. Norvick ordered the men back to work, within sight of Johns' covered body. The coroner, who arrived several hours later, reported that Johns had died from a heart attack brought on by the combined factors of heat, humidity, and heavy exertion.

The entire experience left Gottshall extremely agitated and distraught. Over the next several days, during which he continued to work in hot and humid weather conditions, Gottshall began to feel ill. He became preoccupied with the events surrounding Johns' death, and worried that he would die under similar circumstances. Shortly after Johns' funeral, Gottshall was admitted to a psychiatric institution, where he was diagnosed as suffering from major depression and post-traumatic stress disorder. During the three weeks he spent at the institution, Gottshall experienced nausea, insomnia, cold sweats, and repetitive nightmares concerning Johns' death. He lost a great deal of weight and suffered from suicidal preoccupations and anxiety. Gottshall has continued to receive psychological treatment since his discharge from the hospital.

Gottshall sued Conrail under FELA for negligent infliction of emotional distress. He alleged that Conrail's negligence had created the circumstances under which he had been forced to observe and participate in the events surrounding Johns' death. The District Court granted Conrail's motion for summary judgment, holding that FELA did not provide a remedy for Gottshall's emotional injuries.

A divided panel of the United States Court of Appeals for the Third Circuit reversed and remanded for trial. *Gottshall* v.

*Consolidated Rail Corp.*, 988 F. 2d 355 (1993). The court observed that most States recognize a common-law cause of action for negligent infliction of emotional distress, but limit recovery to certain classes of plaintiffs or categories of claims through the application of one or more tests. *Id.*, at 361 (discussing "physical impact," "zone of danger," and "relative bystander" tests). The Third Circuit suggested that because "an emotional injury is easier to fake" than a physical injury, these tests have been "judicially developed to screen causes of action and send only the meritorious ones to juries." *Ibid.*

The court below identified what it considered to be a fundamental tension between the restrictive attitude of the common law toward claims for negligent infliction of emotional distress on the one hand, and the general policy underlying FELA on the other. According to the Third Circuit, the common law places harsh and arbitrary limits on recovery for emotional injury, while FELA has consistently been interpreted to accord liberal relief to railroad workers injured through the negligence of their employers. *Id.*, at 367-368 (discussing cases).

In the Third Circuit's view, the only way to reconcile the apparent tension was to give preference to the liberal recovery policy embodied in FELA over the common law: "[D]octrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims." *Id.*, at 369. Determining that judges could weed out fraudulent emotional injury claims through careful scrutiny of the facts, the court held that the facts alleged in support of a claim under FELA for negligent infliction of emotional distress must "provide a threshold assurance that there is a likelihood of genuine and serious emotional injury." *Id.*, at 371. The Third Circuit suggested that a court's factual inquiry might include consideration of the plaintiff's claim in light of the present state of the common law.

*Appendix B*

After reviewing the facts of Gottshall's case, the Third Circuit concluded that Gottshall had made a sufficient showing that his injuries were genuine and severe. *Id.*, at 374. Because his claim had met the court's threshold "genuineness" test, the court next considered whether the claim adequately alleged the usual FELA elements of breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation. The panel majority concluded that there were genuine issues of material fact concerning whether Gottshall's injuries were foreseeable by Conrail, whether Conrail had acted unreasonably, and whether Conrail's conduct had caused cognizable injury to Gottshall. The court therefore remanded for trial. *Id.*, at 383.

Judge Roth dissented in part because she believed that there was no triable issue regarding breach of duty. She reasoned that "outside of the interruption of the communications link, the allegedly negligent conditions created by Conrail at the time of Johns' collapse consisted in fact of the members of the work gang performing the negotiated duties of their jobs under conditions which may indeed have been difficult but which had occurred in the past and will probably occur again in the future." *Id.*, at 385. In her view, these negotiated duties could not support a finding of negligence. Judge Roth concluded that "Conrail could not reasonably have foreseen that its negligence in interrupting the work gang's communication[s] link might cause James Gottshall's severe emotional reaction to the death of Richard Johns." *Id.*, at 386.

B

Respondent Carlisle began working as a train dispatcher for Conrail in 1976. In this position, he was responsible for ensuring the safe and timely movement of passengers and cargo. Aging railstock and outdated equipment made Carlisle's job difficult.

*Appendix B*

Reductions in Conrail's work force required Carlisle to take on additional duties and to work long hours. Carlisle and his fellow dispatchers frequently complained about safety concerns, the high level of stress in their jobs, and poor working conditions. In 1988, Carlisle became trainmaster in the South Philadelphia yards. With this promotion came added responsibilities that forced him to work erratic hours. Carlisle began to experience insomnia, headaches, depression, and weight loss. After an extended period during which he was required to work 12- to 15-hour shifts for weeks at a time, Carlisle suffered a nervous breakdown.

Carlisle sued Conrail under FELA for negligent infliction of emotional distress. He alleged that Conrail had breached its duty to provide him with a safe workplace by forcing him to work under unreasonably stressful conditions, and that this breach had resulted in foreseeable stress-related health problems, At trial, Carlisle called medical experts who testified that his breakdown and ensuing severe depression were caused at least in part by the strain of his job. The jury awarded Carlisle $386,500 in damages.

The Third Circuit affirmed, "uphold[ing] for the first time a claim under the FELA for negligent infliction of emotional distress arising from work-related stress." *Carlisle v. Consolidated Rail Corp.*, 990 F. 2d 90, 97-98 (1993). In rejecting Conrail's argument that Carlisle had failed to make out a claim under FELA because he had not alleged any accident or physical injury or impact, the court noted that in *Gottshall* (decided the month before), it had "upheld recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact." *Id.*, at 96. Restating its holding in *Gottshall*, the court advised that, when evaluating a claim under FELA for negligently inflicted emotional distress, district courts within the Third Circuit "should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should

apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim." 990 F. 2d, at 98.

In the case before it, however, the court did not examine Carlisle's suit in light of any of the various common-law tests for dealing with negligent infliction of emotional distress claims. Instead, it shifted its primary emphasis to the foreseeability of the alleged injury and held that "when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to the worker, the employer may be held to be liable under the FELA for the employee's resulting injuries." *Id.*, at 97. The Third Circuit held that Carlisle had produced sufficient evidence that his injury had been foreseeable to Conrail. The court also found sufficient evidence that Conrail had breached its duty to provide Carlisle with a safe workplace by making his employment too demanding, and that this breach had caused Carlisle's injury. *Ibid.*

Pursuant to this Court's Rule 12.2, Conrail petitioned for review of the Third Circuit's decisions in *Gottshall* and *Carlisle*. We granted certiorari, 510 U.S. ___ (1993), to resolve a conflict among the Courts of Appeals concerning the threshold standard that must be met by plaintiffs bringing claims for negligent infliction of emotional distress under FELA.[1]

II

In these cases, we address questions left unanswered in

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1. Compare the decisions below with *Ray v. Consolidated Rail Corp.*, 938 F. 2d 704 (CA7 1991), cert. denied, 502 U. S. ___ (1992); *Elliott v. Norfolk & Western R. Co.*, 910 F. 2d 1224 (CA4 1990); *Adams v. CSX Transp., Inc.*, 899 F. 2d 536 (CA6 1990); *Gaston v. Flowers Transp.*, 866 F. 2d 816 (CA5 1989).

*Atchison, T. & S. R. Co. v. Buell,* 480 U. S. 557 (1987). That case involved a FELA complaint filed by a railroad carman who alleged that the intentional and negligent actions of his employer had caused him to suffer emotional injuries. We rejected the railroad's contention that the FELA action should be barred because the conduct complained of was subject to arbitration under the terms of the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §151 *et seq.* See 480 U.S., at 564-567. Because the record was not fully developed, however, we were unable to reach the railroad's alternative argument that purely emotional injury was not compensable under FELA. Today, we must resolve one of the questions reserved in *Buell*: whether recovery for negligent infliction of emotional distress is available under FELA.[2] If we conclude that it is, we must consider the proper scope of that availability. Our FELA jurisprudence outlines the analysis we must undertake when deciding whether, and to what extent, this new category of claims should be cognizable under the statute.

First, as in other cases involving the scope of the statute, we must look to FELA itself, its purposes and background, and the construction we have given it over the years. See, *e.g., id.,* at 561-562. Second, because "FELA jurisprudence gleans guidance from common-law developments," *id.,* at 568, we must consider the common law's treatment of the right of recovery asserted by respondents. See, *e. g., Monessen Southwestern R. Co. v. Morgan,* 486 U.S. 330, 336-339 (1988) (disallowing prejudgment interest under FELA in large part because such interest was unavailable at common law when FELA was enacted); *Buell, supra,* at 568-570. Cf. *Urie v. Thompson,* 337 U.S. 163, 174 (1949); *Kernan v. American Dredging Co.,* 355 U.S. 426, 432 (1958).

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2. We are not concerned here with the separate tort of intentional infliction of emotional distress.

*Appendix B*

A

We turn first to the statute. Section 1 of FELA provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. §51. Our task today is determining under what circumstances emotional distress may constitute "injury" resulting from "negligence" for purposes of the statute. As we previously have recognized when considering §51, when Congress enacted FELA in 1908, its "attention was focused primarily upon injuries and death resulting from accidents on interstate railroads." *Urie, supra,* at 181. Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the " 'human overhead' " of doing business from employees to their employers. *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54, 58 (1943). See also *Wilkerson v. McCarthy,* 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations"). In order to further FELA's humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers. Specifically, the statute abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract; a 1939 amendment abolished the assumption of risk defense. See 45 U.S.C. §§51, 53-55.

We have liberally construed FELA to further Congress' remedial goal. For example, we held in *Rogers v. Missouri Pacific*

*R. Co.*, 352 U.S. 500 ( 1957), that a relaxed standard of causation applies under FELA. We stated that "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.*, at 506. In *Kernan, supra,* we extended the reach of the principle of negligence *per se* to cover injuries suffered by employees as a result of their employers' statutory violations, even if the injuries sustained were not of a type that the relevant statute sought to prevent. See 355 U.S., at 432-436. And in *Urie, supra,* we held that occupational diseases such as silicosis constitute compensable physical injuries under FELA, thereby rejecting the argument that the statute covered only injuries and deaths caused by accidents. See 337 U.S., at 181.

That FELA is to be liberally construed, however, does not mean that it is a workers' compensation statute. We have insisted that FELA "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." *Ellis v. Union Pacific R. Co.*, 329 U.S. 649, 653 (1947). Accord, *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138, 140 (1959); *Wilkerson, supra,* at 61. And while "[w]hat constitutes negligence for the statute's purposes is a federal question," *Urie,* 337 U.S., at 174, we have made clear that this federal question generally turns on principles of common law: "the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Id.*, at 182. Those qualifications, discussed above, are the modification or abrogation of several common-law defenses to liability, including contributory negligence and assumption of risk. See 45 U.S.C. §§51, 53-55. Only to the extent of these explicit statutory alterations is FELA "an avowed departure from the rules

of the common law." *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326, 329 (1968). Thus, although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. Cf. *Buell*, 480 U. S., at 568. Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.

B

We turn, therefore, to consider the right of recovery pursued by respondents in light of the common law. Cf. *Monessen*, 486 U.S., at 336-339; *Buell, supra*, at 568-570. The term "negligent infliction of emotional distress" is largely self-explanatory, but a definitional point should be clarified at the outset. The injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury, cf. *id.*, at 568, apart from the tort law concepts of pain and suffering. Although pain and suffering technically are mental harms, these terms traditionally "have been used to describe sensations stemming directly from a physical injury or condition." Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 485, n. 45 (1982). The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms.

Nearly all of the States have recognized a right to recover for negligent infliction of emotional distress, as we have defined it.[3]

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3. There are a few exceptions. Negligent infliction of emotional distress is not actionable in Alabama. See *Allen v. Walker*, 569 So. 2d 350 (Ala. 1990). It is unclear

No jurisdiction, however, allows recovery for all emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another. Indeed, significant limitations, taking the form of "tests" or "rules," are placed by the common law on the right to recover for negligently inflicted emotional distress, and have been since the right was first recognized late in the last century.

Behind these limitations lie a variety of policy considerations, many of them based on the fundamental differences between emotional and physical injuries. "Because the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned . . . that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act." *Maloney v. Conroy,* 208 Conn. 392, 397-398, 545 A. 2d 1059, 1061 (1988). The last concern has been particularly significant. Emotional injuries may occur far removed in time and space from the negligent conduct that triggered them. Moreover, in contrast to the situation with physical injury, there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act.[4] The incidence and severity of emotional injuries

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whether such a claim is cognizable in Arkansas. Compare *Mechanics Lumber Co. v. Smith,* 296 Ark. 285, 752 S. W. 2d 763 (1988), with *M. B. M. Co. v. Counce,* 268 Ark. 269, 596 S. W. 2d 681 (1980).

4. See Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 507 (1982) ("The geographic risk of physical impact caused by the defendant's

are also more difficult to predict than those of typical physical injuries because they depend on psychological factors that ordinarily are not apparent to potential tortfeasors.

For all of these reasons, courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants. Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable. See, e. g., *Thing* v. *La Chusa,* 48 Cal. 3d 644, 654, 771 P. 2d 814, 819 (1989) ("[P]olicy considerations mandat[e] that infinite liability be avoided by restrictions that . . . narrow the class of potential plaintiffs"), *Tobin v. Grossman,* 24 N. Y. 2d 609, 616, 249 N. E. 2d 419, 423 (1969).[5] Some courts phrase the limitations in terms of proximate causation; that is, only certain plaintiffs or injuries are reasonably foreseeable. Other courts speak of the limitations in terms of duty; the defendant owes only a certain class of plaintiffs a duty to avoid inflicting emotional harm. See, *e. g.,* Pearson, *supra,* at 489 n. 72 (discussing *Palsgraf v. Long Island R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928)). These formulations are functionally equivalent. We shall refer to the common-law limitations as outlining the duty of defendants with regard to negligent infliction of emotional distress.

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negligence in most cases is quite limited, which accordingly limits the number of people subjected to that risk. There is no similar finite range of risk for emotional harm").

5. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 54, p. 366 (5th ed. 1984) ("It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends").

*Appendix B*

Three major limiting tests for evaluating claims alleging negligent infliction of emotional distress have developed in the common law. The first of these has come to be known as the "physical impact" test. It originated a century ago in some of the first cases recognizing recovery for negligently inflicted emotional distress. At the time Congress enacted FELA in 1908 most of the major industrial States had embraced this test. See Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260, 263-264, and n. 25 (1921).[6] Under the physical impact test, a plaintiff seeking damages for emotional injury stemming from a negligent act must have contemporaneously sustained a physical impact (no matter how slight) or injury due to the defendant's conduct. Most jurisdictions have abandoned this test, but at least five States continue to adhere to it.[7]

The second test has come to be referred to as the "zone of danger" test. It came into use at roughly the same time as the physical impact test, and had been adopted by several jurisdictions at the time FELA was enacted. See Throckmorton, *supra*, at 264-265, and n. 28.[8] See also Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 50 Am. L. Reg. 141,

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6. See, *e. g., Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88 (1897); *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896); *Ewing v. Pittsburgh, C., C. & St. L. R. Co.*, 147 Pa. 40, 23 A. 340 (1892).

7. See *OB-GYN Assocs. of Albany v. Littleton*, 259 Ga. 663, 386 S. E. 2d 146 (1989); *Shuamber v. Henderson*, 579 N. E. 2d 452 (Ind. 1991); *Anderson v. Scheffler*, 242 Kan. 857, 752 P. 2d 667 (1988); *Deutsch v. Shein*, 597 S. W. 2d 141 (Ky. 1980); *Hammond v. Central Lane Communications Center*, 312 Ore. 17, 816 P. 2d 593 (1991).

8. See, *e. g., Simone v. Rhode Island Co.*, 28 R. I. 186, 66 A. 202 (1907); *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778 (1906); *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 54 S. W. 944 (1900); *Mack v. South-Bound R. Co.*, 52 S. C. 323,

and nn. 3-5 (1902). Perhaps based on the realization that "a near miss may be as frightening as a direct hit," Pearson. U. Fla. L. Rev., at 488, the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot." *Id.*, at 489. The zone of danger test currently is followed in 14 jurisdictions.[9]

The third prominent limiting test is the "relative bystander" test, which was first enunciated in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P. 2d 912 (1968). In *Dillon*, the California Supreme Court rejected the zone of danger test and suggested that the availability of recovery should turn, for the most part, on whether the defendant could reasonably have foreseen the emotional injury to the plaintiff. The court offered three factors to be considered as bearing on the question of reasonable foreseeability:

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29 S. E. 905 (1898); *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892). See also *Pankopf v. Hinkley*, 141 Wis. 146, 123 N. W. 625 (1909); *Stewart v. Arkansas Southern R. Co.*, 112 La. 764, 36 So. 676 (1904); *Watson v. Dilts*, 116 Iowa 249, 89 N. W. 1068 (1902).

9. See *Keck v. Jackson*, 122 Ariz. 114, 593 P. 2d 668 (1979); *Town v. Anderson*, 195 Colo. 517, 579 P. 2d 1163 (1978); *Robb v. Pennsylvania R. Co.*, 58 Del. 454, 210 A. 2d 709 (1965); *Williams v. Baker*, 572 A. 2d 1062 (D. C. App. 1990); *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N. E. 2d 1 (1983); *Resavage v. Davies*, 199 Md. 479, 86 A. 2d 879 (1952); *Stadler v. Cross*, 295 N. W. 2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S. W. 2d 595 (Mo. 1990); *Bovsun v. Sanperi*, 61 N. Y. 2d 219, 461 N. E. 2d 843 (1984); *Whetham v. Bismarck Hosp.*, 197 N. W. 2d 678 (N. D. 1972); *Shelton v. Russell Pipe & Foundry Co.*, 570 S. W. 2d 861 (Tenn. 1978); *Boucher v. Dixie Medical Center, A Div. of IHC Hosps., Inc.*, 850 P. 2d 1179 (Utah 1992); *Jobin v. McQuillen*, 158 Vt. 322, 609 A. 2d 990 (1992); *Garrett v. New Berlin*, 122 Wis. 2d 223, 362 N. W. 2d 137 (1985).

*Appendix B*

> "(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." *Id.*, at 740-741, 441 P. 2d, at 920.

The courts of nearly half the States now allow bystanders outside of the zone of danger to obtain recovery in certain circumstances for emotional distress brought on by witnessing the injury or death of a third party (who typically must be a close relative of the bystander) that is caused by the defendant's negligence.[10] Most of

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10. See *Croft v. Wicker*, 737 P. 2d 789 (Alaska 1987); *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P. 2d 814 (1989); *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); *Fineran v. Pickett*, 465 N. W. 2d 662 (Iowa 1991); *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990); *Cameron v. Pepin*, 610 A. 2d 279 (Me. 1992); *Stockdale v. Bird & Son, Inc.*, 399 Mass. 249, 503 N. E. 2d 951 (1987); *Nugent v. Bauermeister*, 195 Mich. App. 158, 489 N. W. 2d 148 (1992), app. den., 442 Mich. 929, 503 N. W. 2d 904 (1993); *Entex, Inc. v. McGuire*, 414 So. 2d 437 (Miss. 1982); *Maguire v. State*, 254 Mont. 178, 835 P. 2d 755 (1992); *James v. Lieb*, 221 Neb. 47, 375 N. W. 2d 109 (1985); *Buck v. Greyhound Lines, Inc.*, 105 Nev. 756, 783 P. 2d 437 (1989); *Wilder v. Keene*, 131 N. H. 599, 557 A. 2d 636 (1989); *Frame v. Kothari*, 115 N. J. 638, 560 A. 2d 675 (1989); *Folz v. State*, 110 N. M. 457, 797 P. 2d 246 (1990); *Johnson v. Ruark Obstetrics and Gynecology Assocs.*, 327 N. C. 283, 395 S. E. 2d 85 (1990); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N. E. 2d 759 (1983); *Sinn v. Burd*, 486 Pa. 146, 404 A. 2d 672 (1979); *Reilly v. United States*, 547 A. 2d 894 (R. I. 1988); *Kinard v. Augusta Sash & Door Co.*, 286 S. C. 579, 336 S. E. 2d 465 (1985); *Boyles v. Kerr*, 855 S. W. 2d 593 (Tex. 1993); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P. 2d 553 (1990); *Heldreth v. Marrs*, 188 W. Va. 481, 425 S. E. 2d 157 (1992); *Contreras v. Carbon County School Dist. No. 1*, 843 P. 2d 589 (Wyo. 1992).

these jurisdictions have adopted the *Dillon* factors either verbatim or with variations and additions, and have held some or all of these factors to be substantive limitations on recovery.[11]

III

A

Having laid out the relevant legal framework, we turn to the questions presented. As an initial matter, we agree with the Third Circuit that claims for damages for negligent infliction of emotional distress are cognizable under FELA. A combination of many of the factors discussed above makes this conclusion an easy one. A right to recover for negligently inflicted emotional distress was recognized in some form by many American jurisdictions at the time FELA was enacted, see nn. 6 and 8, *supra*, and this right is nearly universally recognized among the States today. See *supra*, at 13-16. Moreover, we have accorded broad scope to the statutory term "injury" in the past in light of FELA's remedial purposes. Cf. *Urie*, 337 U. S., at 181. We see no reason why emotional injury should not be held to be encompassed within that term, especially given that "severe emotional injuries can be just as debilitating as physical injuries." *Gottshall*, 988 F. 2d, at 361. We therefore hold that, as part of its "duty to use reasonable care in furnishing its employees with a safe place to work," *Buell*, 480 U. S., at 558, a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury. This latter duty, however, is not self-defining. Respondents defend the Third Circuit's

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11. Many jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a "physical manifestation" of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover. See, e. g., *Garvis* v. *Employers Mut. Casualty Co.*, 497 N. W. 2d 254 (Minn. 1993).

definition of the duty we recognize today; Conrail offers its own proposed delineation. We consider the proposals in turn.

B

When setting out its view of the proper scope of recovery for negligently inflicted emotional distress under FELA, the Third Circuit explicitly refused to adopt any of the common-law tests described above; indeed, the court in *Gottshall* went so far as to state that "doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims." 988 F. 2d, at 369. Instead, the court developed its own test, under which "[t]he issue is whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and serious emotional injury." *Id.*, at 371. If this threshold test is satisfied, the claim should be evaluated in light of traditional tort concepts such as breach of duty, injury, and causation, with the focus resting on the foreseeability of the plaintiff's injury. *Id.*, at 374-375. In *Gottshall,* the Third Circuit did at least consider the plaintiff's claim in light of the common law of negligent indiction of emotional distress as part of its factual "genuineness" inquiry. By the time the court next applied the *Gottshall* genuineness test, however, the common-law aspect of its analysis had completely disappeared; Carlisle's stress-related claim was not evaluated under any of the common-law tests. In *Carlisle,* the Third Circuit refined its test to two questions — whether there was convincing evidence of the genuineness of the emotional injury claim (with "genuine" meaning authentic and serious), and if there was, whether the injury was foreseeable. If these questions could be answered affirmatively by the court, there was "no bar to recovery under the FELA." 990 F. 2d, at 98.

The Third Circuit's standard is fatally flawed in a number of respects. First, as discussed above, because negligent infliction of

emotional distress is not explicitly addressed in the statute, the common-law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA to avoid inflicting emotional injury. Cf. *Monessen*, 486 U.S., at 336-339; *Buell, supra*, at 568-570; *Urie, supra*, at 182. By treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on "meritorious" FELA claims, the Third Circuit put the cart before the horse: the common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the "merit" of a FELA claim of this type cannot be ascertained without reference to the common law.

Perhaps the court below believed that its focus on the perceived genuineness of the claimed emotional injury adequately addressed the concerns of the common-law courts in dealing with emotional injury claims. But the potential for fraudulent and trivial claims—the concern identified by the Third Circuit—is only one of the difficulties created by allowing actions for negligently inflicted emotional distress. A more significant problem is the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants. The common law consistently has sought to place limits on this potential liability by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover. This concern underlying the common-law tests has nothing to do with the potential for fraudulent claims; on the contrary, it is based upon the recognized possibility of *genuine* claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct.

Second, we question the viability of the genuineness test on its own terms. The Third Circuit recognized that "there must be some

finite limit to the railway's potential liability" for emotional injury claims under FELA, and suggested that liability could be restricted through application of the genuineness test. *Gottshall,* 988 F. 2d, at 379. But as just explained, testing for the "genuineness" of an injury alone cannot appreciably diminish the possibility of infinite liability. Such a fact-specific test, moreover, would be bound to lead to haphazard results. Judges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts. To the extent the genuineness test could limit potential liability, it could do so only inconsistently. Employers such as Conrail would be given no standard against which to regulate their conduct under such an *ad hoc* approach. In the context of claims for intangible harms brought under a negligence statute, we find such an arbitrary result unacceptable. Cf. *Stadler v. Cross,* 295 N. W. 2d 552, 554 (Minn. 1980).

Third, to the extent the Third Circuit relied on the concept of foreseeability as a meaningful limitation on liability, we believe that reliance to be misplaced. If one takes a broad enough view, *all* consequences of a negligent act, no matter how far removed in time or space, may be foreseen. Conditioning liability on foreseeability, therefore, is hardly a condition at all. "Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." *Tobin,* 24 N. Y. 2d, at 619, 249 N. E. 2d, at 424. See also *Thing,* 48 Cal. 3d, at 668, 771 P. 2d, at 830 ("[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery").

This is true as a practical matter in the FELA context as well, even though the statute limits recovery to railroad workers. If

emotional injury to Gottshall was foreseeable to Conrail, such injury to the other seven members of his work crew was also foreseeable. Because one need not witness an accident to suffer emotional injury therefrom, however, the potential liability would not necessarily have to end there; any Conrail employees who heard or read about the events surrounding Johns' death could also foreseeably have suffered emotional injury as a result. Of course, not all of these workers would have been as traumatized by the tragedy as was Gottshall, but many could have been. Under the Third Circuit's standard, Conrail thus could face the potential of unpredictable liability to a large number of employees far removed from the scene of the allegedly negligent conduct that led to Johns' death.[12]

Finally, the Third Circuit in *Carlisle* erred in upholding "a claim under the FELA for negligent infliction of emotional distress arising from work-related stress." 990 F. 2d, at 97-98. We find no support in the common law for this unprecedented holding, which would impose a duty to avoid creating a stressful work environment, and thereby dramatically expand employers' FELA liability to cover the stresses and strains of everyday employment. Indeed, the Third Circuit's ruling would tend to make railroads the insurers of the emotional well-being and mental health of their employees. We have made clear, however, that FELA is not an insurance statute. See, *e. g.*, *Ellis*, 329 U. S., at 653. For the foregoing reasons, we reject the Third Circuit's approach.

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12. The Third Circuit did require that the emotional injury be "reasonably" foreseeable, see *Carlisle*, 990 F. 2d, at 97, but under the circumstances, that qualifier seems to add little. Suffice it to say that if Gottshall's emotional injury stemming from Johns' death was reasonably foreseeable to Conrail, nearly any injury could also be reasonably foreseeable.

*Appendix B*

C

Conrail suggests that we adopt the common-law zone of danger test as delimiting the proper scope of an employer's duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury. We agree that the zone of danger test best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence.

As we did in *Monessen,* we begin with the state of the common law in 1908, when FELA was enacted. In determining in *Monessen* whether prejudgment interest was available under FELA, we recognized that the common law in 1908 did not allow such interest in personal injury and wrongful death suits. Because in enacting FELA, "Congress expressly dispensed with other common-law doctrines of that era, such as the defense of contributory negligence," but "did not deal at all with the equally well-established doctrine barring the recovery of prejudgment interest," we concluded that Congress intended to leave the common-law rule intact. 486 U. S., at 337-338. In contrast, the right to recover for negligently inflicted emotional distress was well-established in many jurisdictions in 1908. Although at that time, "the weight of American authority" favored the physical impact test, Throckmorton, 34 Harv. L. Rev., at 264, the zone of danger test had been adopted by a significant number of jurisdictions. See n. 8, *supra.* Moreover, because it was recognized as being a progressive rule of liability that was less restrictive than the physical impact test, the zone of danger test would have been more consistent than the physical impact test with FELA's broad remedial goals. See *Waube v. Warrington,* 216 Wis. 603, 608, 268 N. W. 497, 499 (1935) (discussing early emotional injury cases and referring to zone of danger test as "the liberal rule"). Considering the question "in the appropriate historical context," *Monessen, supra,* at 337,

then, it is reasonable to conclude that Congress intended the scope of the duty to avoid inflicting emotional distress under FELA to be coextensive with that established under the zone of danger test. That is, an emotional injury constitutes "injury" resulting from the employer's "negligence" for purposes of FELA only if it would be compensable under the terms of the zone of danger test. See 45 U.S.C. §51. Cf. *Urie*, 337 U. S. at 182.

Current usage only confirms this historical pedigree. The zone of danger test presently is followed by 14 jurisdictions. It therefore remains to this day a well-established "common-law concep[t] of negligence," *ibid.*, that is suitable to inform our determination of the federal question of what constitutes negligence for purposes of FELA. Cf. *Buell*, 480 U. S., at 568-570; *Kernan*, 355 U. S., at 432.

The zone of danger test also is consistent with FELA's central focus on physical perils. We have recognized that FELA was intended to provide compensation for the injuries and deaths caused by the physical dangers of railroad work by allowing employees or their estates to assert damages claims. Cf. *Urie*, *supra*, at 181. By imposing liability, FELA presumably also was meant to encourage employers to improve safety measures in order to avoid those claims. cf. *Wilkerson*, 336 U. S., at 68 (Douglas, J., concurring). As the Seventh Circuit has observed, FELA was (and is) aimed at ensuring "the security of the person from physical invasions or menaces." *Lancaster v. Norfolk & Western R. Co.*, 773 F. 2d 807, 813 (1985), cert. denied, 480 U. S. 945 (1987). But while the statute may have been primarily focused on physical injury, it refers simply to "injury," which may encompass both physical and emotional injury. We believe that allowing recovery for negligently inflicted emotional injury as provided for under the

zone of danger test best harmonizes these considerations. Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries — physical and emotional — caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting the statute of alleviating the physical dangers of railroading.

The physical impact test, of course, would achieve many of the same ends as the zone of danger test. We see no reason, however, to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur. And the physical impact test has considerably less support in the current state of the common law than the zone of danger test. See *supra*, at 13-15.

As for the relative bystander test, we conclude that it is an inappropriate rule in the FELA context. As an initial matter, it was not developed until 60 years after FELA's enactment, and therefore lacks historical support. Cf. *Monessen, supra.* Moreover, in most jurisdictions that adhere to it, this test limits recovery to persons who witness the severe injury or death of a close family member. Only railroad employees (and their estates) may bring FELA claims, however, and presumably it would be a rare occurrence for a worker to witness during the course of his employment the injury or death of a close family member. In any event, we discern from FELA and its emphasis on protecting employees from physical harms no basis to extend recovery to bystanders outside the zone of danger. Cf. *Gaston v. Flowers Transp.*, 866 F. 2d 816, 820-821 (CA5 1989).

*Appendix B*

Respondents decry the zone of danger test as arbitrarily excluding valid claims for emotional injury. But "[c]haracterizing a rule limiting liability as 'unprincipled' or 'arbitrary' is often the result of overemphasizing the policy considerations favoring imposition of liability, while at the same time failing to acknowledge any countervailing policies and the necessary compromise between competing and inconsistent policies informing the rule." *Cameron v. Pepin*, 610 A. 2d 279, 283 (Me. 1992). Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. Although some of these grounds have been criticized by commentators, they all continue to give caution to courts. We believe the concerns that underlie the common-law tests, and particularly the fear of unlimited liability, to be well-founded.

Perhaps the zone of danger test is "arbitrary" in the sense that it does not allow recovery for all emotional distress. But it is fully consistent with our understanding of the statute. And for the reasons discussed above, we conclude that the policy considerations of the common law as they are embodied in the zone of danger test best accord with the concerns that have motivated our FELA jurisprudence.

IV

Because the Third Circuit applied an erroneous standard for evaluating claims for negligent infliction of emotional distress brought under FELA, we reverse the judgments below. In

*Gottshall,* we remand for reconsideration under the zone of danger test announced today. Gottshall asserts before this Court that he would in fact meet the requirements of the zone of danger test, while Conrail disagrees. The question was not adequately briefed or argued before us, however, and we believe it best to allow the Third Circuit to consider the question in the first instance in light of relevant common-law precedent.

In *Carlisle,* however, we remand with instructions to enter judgment for Conrail. Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger, and Carlisle makes no argument that it does. Without any support in the common law for such a claim, we will not take the radical step of reading FELA as compensating for stress arising in the ordinary course of employment. In short, the core of Carlisle's complaint was that he "had been given too much — not too dangerous — work to do. That is not our idea of an FELA claim." *Lancaster,* 773 F. 2d, at 813.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion.

*So ordered.*

JUSTICE SOUTER, concurring.

I join the Court's opinion holding that claims for negligent infliction of emotional distress are cognizable under FELA, and that the zone of danger test is the appropriate rule for determining liability for such claims. I write separately to make explicit what I believe the Court's duty to be in interpreting FELA. That duty is to develop a federal common law of negligence under FELA,

informed by reference to the evolving common law. See *Atchison, T. & S. F. R. Co. v. Buell*, 480 U. S. 557, 568-570 (1987). As we have explained:

> "[I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers . . . and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U. S. 426, 432 (1958).

Because I believe the Court's decision today to be a faithful exercise of that duty, and because there can be no question that adoption of the zone of danger test is well within the discretion left to the federal courts under FELA, I join in its opinion.

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.*, instructs interstate railroads " 'to use reasonable care in furnishing [their] employees with a safe place to work.' " *Ante*, at 17, quoting *Atchison T. & S. F. R. Co. v. Buell*, 480 U. S. 557, 558 (1987). As the Court today recognizes, the FELA-imposed

obligation encompasses "a duty . . . to avoid subjecting [railroad] workers to negligently inflicted emotional injury." *Ante,* at 17.

The Court limits the scope of the railroad's liability, however, by selecting one of the various "tests" state courts have applied to restrict recovery by members of the public for negligently inflicted emotional distress. The Court derives its limitation largely from a concern, often expressed in state court opinions, about the prospect of "infinite liability" to an "infinite number of persons." See *ante,* at 19. This concern should not control in the context of the FELA, as I see it, for the class of potential plaintiffs under the FELA is not the public at large; the Act covers only railroad workers who sustain injuries on the job. In view of the broad language of the Act,[1] and this Court's repeated reminders that the FELA is to be liberally construed, 1 cannot regard as faithful to the legislation and our case law under it the restrictive test announced in the Court's opinion.

I

The FELA was designed to provide a federal "statutory negligence action . . . significantly different from the ordinary common-law negligence action." *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 509-510 (1957). An "avowed departure" from prevailing common-law rules, *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958), the Act advanccd twin purposes: "to eliminate a number of traditional defenses to tort liability and to

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1. Section 1 of the FELA provides, in relevant part, that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . [when such injury results] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. §51.

facilitate recovery in meritorious cases." *Buell, supra,* at 561.[2] "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.,* 355 U.S. 426, 432 (1958). Relying upon "the breadth of the statutory language, [and] the Act's humanitarian purposes," this Court has accorded the FELA a notably "liberal construction in order to accomplish [Congress'] objects." *Urie v. Thompson*, 337 U. S. 163, 180 (1949); see *Buell, supra,* at 562.

In particular, the Court has given full scope to the key statutory term "injury." The Act prescribes that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier." 45 U.S.C. §51. That prescription, this Court observed, is "not restrictive as to . . . the particular kind of injury." *Urie,* 337 U.S., at 181. "[W]hen the statute was enacted," it is true, "Congress' attention was focused primarily upon . . . accidents on interstate railroads," for "these were the major causes of injury and death resulting from railroad operations." *Ibid.* But "accidental injuries were not the only ones likely to occur," and Congress chose "all-inclusive wording." *Ibid.* "To read into [language as broad as could be framed] a restriction [tied] to . . . the particular sorts of harms inflicted," the Court recognized, "would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." *Id.*, at 181-182.

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2. The FELA, as enacted in 1908, abolished the employer's "fellow servant" defense and provided that an employee's negligence would not bar, but only reduce recovery; the Act further prohibited employers from exempting themselves contractually from statutory liability. 45 U.S.C. §§51, 53, 55. As amended in 1939, the Act also abolished the employer's assumption of risk defense. §54.

*Appendix B*

II

Seven years ago, in *Atchison T. & S. F. R. Co. v. Buell,* 480 U.S. 557 (1987), the Court left unresolved the question whether emotional injury is compensable under the FELA, because the record in that case did not adequately present the issue. *Id.,* at 560-561, 570-571. In his unanimous opinion for the Court, JUSTICE STEVENS explained why the question could not be resolved on a fact-thin record:

> "[W]hether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts or the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common-law developments, see *Urie v. Thompson,* 337 U.S., at 174, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity . . . [T]he question whether one can recover for emotional injury may not be susceptible to an all-inclusive 'yes' or 'no' answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." 480 U.S., at 568-570.

In deciding the cases now under review, the Court of Appeals endeavored to "field the *Buell* pitch." *Gottshall,* 988 F. 2d 355, 366

(CA3 1993), quoting *Plaisance v. Texaco, Inc.*, 937 F. 2d 1004, 1009 (CA5 1991).

A

In respondent Gottshall's case, the Court of Appeals first described the various rules state courts have applied to common-law actions for negligent infliction of emotional distress. *Id.*, at 361-362. That court emphasized, however, that "[d]etermining FELA liability is distinctly a federal question." *Id.*, at 362. State common-law decisions, the Court of Appeals observed, "do not necessarily etch the contours of the federal right," *ibid.*, for the common law that courts develop to fill the FELA's interstices is "federal" in character. See *id.*, at 367.

In addition to the FELA's express abolition of traditional employer defenses, the Court of Appeals next noted, this Court's decisions interpreting the FELA served as pathmarkers. The Court of Appeals referred to decisions that had relaxed "the strict requirements of causation in common law," *id.*, at 368, citing *Rogers*, 352 U. S., at 506, broadened the conception of negligence *per se*, see 988 F. 2d, at 368, citing *Kernan*, 355 U. S., at 437-439, and generously construed the FELA's injury requirement, 988 F. 2d, at 368, citing *Urie*, 337 U. S., at 181-182. The FELA, the Court of Appeals concluded,

> "imposes upon carriers a higher standard of conduct and has eliminated many of the refined distinctions and restrictions that common law imposed to bar recovery (even on meritorious claims). FELA liability and common law liability are thus different." 988 F. 2d, at 369.

Accordingly, the Court of Appeals "refused to designate a particular common law test as *the* test" applicable in FELA cases. *Id.*, at 365. Instead, the court looked to the purposes of those tests: to distinguish "the meritorious [claim] from the feigned and frivolous," *id.*, at 369, and to assure that liability for negligently inflicted emotional distress does not expand "into the 'fantastic realm of infinite liability.' " *Id.*, at 372, quoting *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 315, 379 P. 2d 513, 525 (1963); see also 988 F. 2d, at 381-382.

FELA jurisprudence, the Court of Appeals reasoned, has evolved not through a "rules first" approach, but in the traditional, fact-bound, case-by-case common-law way. See *id.*, at 371. The court therefore undertook to determine "whether the factual circumstances [in Gottshall's case] provide a threshold assurance that there is a likelihood of genuine and serious emotional injury." *Ibid.* "[O]ne consideration" in that inquiry, the court said, "is whether plaintiff has a 'solid basis in the present state of common law to permit him to recover.' " *Ibid.*, quoting *Outten v. National Railroad Passenger Corp.*, 928 F. 2d 74, 79 (CA3 1991).

Gottshall's claim, the Court of Appeals held, presented the requisite "threshold assurance." His emotional distress, diagnosed by three doctors as major depression and posttraumatic stress disorder, 988 F. 2d, at 374, was unquestionably genuine and severe: He was institutionalized for three weeks, followed by continuing outpatient care; he lost 40 pounds; and he suffered from "suicidal preoccupations, anxiety, sleep onset insomnia cold sweats, . . . nausea, physical weakness, repetitive nightmares and a fear of leaving home." *Ibid.;* see also *id.*, at 373 (noting that Conrail "wisely declined" to attack Gottshall's claim as fraudulent). Gottshall's afflications, the Court of Appeals observed, satisfied the "physical manifestation" limitation that

some States and the Second Restatement of Torts, place on emotional distress recovery. See *id.*, at 373-374 (citing cases); Restatement (Second) of Torts § 436A (1965) (no liability for emotional distress without "bodily harm or other compensable damage"); *ibid.*, Comment c ("[L]ong continued nausea or headaches may amount to physical illness, which is bodily harm; . . . long continued mental disturbance . . . may be classified by the courts as illness" and thus be compensable). Cf. *Buell*, 480 U. S., at 570, n. 22 (suggesting a distinction between claims for "pure emotional injury" and those involving "phychological symptoms in addition to . . . severe psychological illness").

The Court of Appeals also inspected the facts under the "bystander" test, versions of which have been adopted by nearly half the States. See *ante*, at 15. While acknowledging that Gottshall did not satisfy the more restrictive versions of the "bystander" test, the court observed that several States have allowed recovery even where, as here, the plaintiff and the victim of physical injury were unrelated by blood or marriage. See 988 F. 2d, at 371 (citing cases). Further, the court noted, given "the reality of the railway industry," rarely will one "se[e] another family member injured while working in the railroad yard." *Id.*, at 372. A strict version of the bystander rule, therefore, would operate not to limit recovery to the most meritorious cases, but almost to preclude bystander recovery altogether.

To adapt the bystander rule to the FELA context, the court looked to the reasons for limiting bystander recovery: to avoid compensating plaintiffs with fraudulent or trivial claims, and to prevent liability from becoming "an intolerable burden upon society." *Id.*, at 369, 372. The court held that neither concern barred recovery in Gottshall's case. The genuineness of Gottshall's claim appeared not just in the manifestations of his distress, the court said, but also in the extraordinarily close, 15-year friendship

between Gottshall and Johns, the decedent. *Id.*, at 371. Liability to bystanders, the court concluded, would be far less burdensome in the FELA context, where only close co-workers are potential plaintiffs, than in the context of a common-law rule applicable to society as a whole. *Id.*, at 372. In this regard, the Court of Appeals again recalled, this Court has constantly admonished lower courts that "recovery [under the FELA] should be liberally granted," *ibid.*, "so that the remedial and humanitarian goals of the statute can be fully implemented." *Id.*, at 373.

Satisfied that Gottshall had crossed the "genuine and severe" injury threshold, the Court of Appeals inquired whether he had a triable case on breach of duty and causation. *Id.*, at 374. Here, the court emphasized that Gottshall's distress was attributable not to "the ordinary stress of the job." *id.*, at 375, but instead, to Conrail's decision to send a crew of men, most of them 50-60 years old and many of them overweight, out into 97-degree heat at high noon, in a remote, sun-baked location, requiring them to replace heavy steel rails at an extraordinarily fast pace without breaks, and without maintaining radio contact or taking any other precautions to protect the men's safety. *Id.*, at 376-377.

The Court of Appeals stated, further, that even if Conrail could be said to have acted reasonably up to the time of Johns' death, "its conduct after the death raises an issue of whether it breached a legal duty." *Id.*, at 378. The Conrail supervisor required the crew to return to work immediately after Johns' corpse was laid by the side of the road, covered but still in view. *Ibid.* The next day, Gottshall alleged, the supervisor "reprimanded him for administering CPR to Johns," *id.*, at 359, then pushed the crew even harder under the same conditions, requiring a full day, plus three or four hours of overtime. *Id.*, at 378. These circumstances, the Court of Appeals concluded, "created not only physical hazards, but constituted emotional hazards which can equally debilitate and scar an

employee, particularly one who had just witnessed a friend die under the same conditions." *Id.*, at 378.

B

Upholding a jury verdict for plaintiff in *Carlisle,* the Court of Appeals "reaffirm[ed]" its *Gottshall* holding that "no single common law standard" governs in "weighing the genuineness of emotional injury claims." Instead, the court said:

> "[C]ourts . . . should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim." 990 F. 2d 90, 98 (CA3 1993).

The Court of Appeals held that the evidence submitted to the jury amply established the claim's genuineness. Carlisle testified that, after Conrail's 1984 reduction-in-force, the pressure on train dispatchers in Philadelphia, already substantial, increased dramatically. As the person chiefly responsible for ensuring the safety of "trains carrying passengers, freight and hazardous materials," Carlisle became "increasingly anxious" over the sharp reduction in staff, together with the outdated equipment and "Conrail's repeated instructions to ignore safety concerns, such as malfunctioning equipment or poor maintenance." *Id.*, at 92. When Carlisle was compelled to work 12 to 15 hour shifts for 15 consecutive days, the resulting additional pressures, and the difficulty of working for "an abusive, alcoholic supervisor," led, according to Carlisle's expert witness, to the nervous breakdown he suffered. *Ibid.*

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Other evidence confirmed Carlisle's testimony. Depositions taken from "Carlisle's co-workers and subordinates" averred that "their jobs as dispatchers and supervisors in the Philadelphia Conrail offices had caused them to suffer cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia." *Ibid.* An official report prepared by the Federal Railway Administration "criticized the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office." *Id.*, at 93. Furthermore, the Court of Appeals pointed out, Carlisle's emotional injury was "accompanied by obvious physical manifestations": "insomnia, fatigue, headaches, . . . sleepwalking and substantial weight-loss." *Id.*, at 97, n. 11, 92. The court specifically noted: "We do not face and do not decide the issue of whether purely emotional injury, caused by extended exposure to stressful, dangerous working conditions, would be compensable under the FELA." *Id.*, at 97, n. 11.

Satisfied that the jury could indeed find Carlisle's injury genuine, and continuing to follow the path it had marked in *Gottshall,* the court next examined the negligence elements of Carlisle's claim. Emphasizing that "Conrail had ample notice of the stressful and dangerous conditions under which Carlisle was forced to work," including actual notice of physical and emotional injuries sustained by Carlisle's coworkers, 990 F. 2d, at 97, the Court of Appeals affirmed the District Court's denial of Conrail's motions for judgment n.o.v. or in the alternative for a new trial. Carlisle's "extended exposure to dangerous and stressful working conditions," the Court concluded, constituted a breach of Conrail's duty to provide a safe workplace, and the breach caused Carlisle's injuries. *Id.*, at 97-98.

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III

The Court initially "agree[s] with the Third Circuit that claims for damages for negligent infliction of emotional distress are cognizable under FELA." *Ante,* at 17. This conclusion, "an easy one" for the Court, *ibid.*, is informed by prior decisions giving full scope to the FELA's term "injury." The Court had explained in *Urie* that an occupational disease incurred in the course of employment—silicosis in that particular case—is as much "injury . . . as scalding from a boiler's explosion." 337 U. S., at 187. Rejecting a reading of the statute that would confine coverage to "accidental injury" of the kind that particularly prompted the 1908 Congress to enact the FELA, the Court said of the occupational disease at issue:

> "[W]hen the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great; when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning." *Id.*, at 186-187.

Similarly, as the Court recognizes today, " 'severe emotional injuries can be just as debilitating as physical injuries,' " hence there is "no reason why emotional injury should not be held to be encompassed within th[e] term ['injury']." *Ante*, at 17, quoting *Gottshall*, 988 F. 2d, at 361.

In my view, the Court of Appeals correctly determined that Gottshall's submissions should survive Conrail's motion for

summary judgment, and that the jury's verdict in favor of Carlisle should stand. Both workers suffered severe injury on the job, and plausibly tied their afflictions to Conrail's negligence. Both experienced not just emotional, but also physical distress: Gottshall lost 40 pounds and suffered from insomnia, physical weakness and cold sweats, while Carlisle experienced "insomnia, fatigue, headaches, . . . sleepwalking and substantial weight-loss." *Id.*, at 374; 990 F. 2d, at 92, 97, n. 11. The Court emphasizes the "significant role" that "common-law principles must play." *Ante*, at 10. Notably in that regard, both Gottshall and Carlisle satisfy the "physical manifestation" test endorsed by the Restatement of Torts. See *supra*, at 6, 9; see also W. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser and Keeton on the Law of Torts 364 (5th ed. 1984) ("the great majority of courts have now repudiated the requirement of 'impact,' regarding as sufficient the requirement that the mental distress be certified by some physical injury, illness or other objective physical manifestation"); *id.*, at 364, n. 55 (citing cases). Thus, without gainsaying that "FELA jurisprudence gleans guidance from common-law developments," *Buell*, 480 U.S., at 568, one can readily conclude that both Gottshall and Carlisle have made sufficient showings of "injuries" compensable under the FELA.[3]

Notwithstanding its recognition that the word "injury," as used in the FELA, "may encompass both physical and emotional injury," the Court elects to render compensable only emotional distress stemming from a worker's placement in the "zone of danger." *Ante*, at 23. In other words, to recover for emotional distress, the railroad employee must show that negligence attributable to his employer threatened him "imminently with physical impact." *Ibid.* Based on the "zone" test, the Court reverses the judgment for Carlisle outright and remands

3. The *Gottshall* and *Carlisle* cases do not call for decision of the question whether physical manifestations would be necessary for recovery in every case.

Gottshall's case for reconsideration under that standard. *Ante,* at 25-26.

The Court offers three justifications for its adoption of the "zone of danger" test. First, the Court suggests that the "zone" test is most firmly rooted in "the common law." The Court mentions that several jurisdictions had adopted the zone of danger test by 1908, *ante,* at 14, and n. 8 (citing cases from eight States), and that the test "currently is followed in 14 American jurisdictions." *Ante,* at 14. But that very exposition tells us that the "zone" test never held sway in a majority of States.

Moreover, the Court never decides firmly on the point of reference, present or historical, from which to evaluate the relative support the different common-law rules have enjoyed. If the Court regarded as decisive the degree of support a rule currently enjoys among state courts, the Court would allow bystander recovery, permitted in some form in "nearly half the States." *Ante,* at 15. But cf. *ante,* at 24 (bystander rule "was not developed until 60 years after FELA's enactment, and therefore lacks historical support"). If, on the other hand, the Court decided that historical support carried the day, then the impact rule, preferred by most jurisdictions in 1908, would be the Court's choice. But cf. *ibid.* (preferring the zone of danger test to the impact rule, because, *inter alia,* the latter "has considerably less support in the current state of the common law" than the former).

The Court further maintains that the zone of danger test is preferable because it is "consistent with FELA's central focus on physical perils." *Ante,* at 23. But as already underscored, see *supra,* at 3, the FELA's language "is as broad as could be framed. . . . On its face, every injury surrered [on the job] by any employee . . . by reason of the carrier's negligence was made compensable." *Urie,* 337 U. S., at 181. And the FELA's strikingly broad language,

characteristically, "has been construed even more broadly," in line with Congress' dominant remedial objective. *Buell,* 480 U. S., at 562 *Urie, supra,* at 181 ("[N]othing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the carrier").

The Court's principal reason for restricting the FELA's coverage of emotional distress claims is its fear of "infinite liability" to an "infinite number of persons." See *ante,* at 19; see also *ante,* at 25 (referring to "the specter of unlimited and unpredictable liability," and stating that "the fear of unlimited liability . . . [ is] well-founded"). The universe of potential FELA plaintiffs, however, is hardly "infinite." The statute does not govern the public at large. Only persons "suffering injury . . . while employed" by a railroad may recover under the FELA, and to do so, the complainant must show that the injury resulted from the railroad's negligence. 45 U. S. C. §51. The Court expresses concern that the approach Gottshall and Carlisle advocate would require "[j]udges . . . to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts." *Ante,* at 19. One solution to this problem—a solution the Court does not explore—would be to require such "objective medical proof" and to exclude, as too insubstantial to count as "injury," claims lacking this proof.

IV

While recognizing today that emotional distress may qualify as an "injury" compensable under the FELA, the Court rejects the Court of Appeals' thoughtfully developed and comprehensively explained approach as "inconsistent with the principles embodied

in the statute and with relevant common-law doctrine." *Ante*, at 1. The Court's formulation, requiring consistency with both the FELA and "common law doctrine," is odd, for there is no unitary common law governing claims for negligent infliction of emotional distress.[4] The "common law" of emotional distress exists not in the singular, but emphatically in the plural; and while the rule the Court has selected is consistent with one common-law rule that some States have adopted, it is inevitably inconsistent with others.

Most critically, the Court selects a common-law rule perhaps appropriate were the task to choose a law governing the generality of federal tort claims. The "zone" rule the Court selects, however, seems to me inappropriate for a federal statute designed to govern the discrete category of on-the-job injuries sustained by railroad workers. In that domain our charge from Congress is to fashion remedies constantly "liberal," and appropriately "enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U. S., at 432. The Court's choice does not fit that bill. Instead of the restrictive "zone" test that leaves severely harmed workers remediless, however negligent their employers, the appropriate FELA claim threshold should be keyed to the genuineness and gravity of the worker's injury.

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4. Throughout its opinion, the Court invokes "the common law" in the singular. See, *e.g.*, *ante*, at 18 ("[T]he common law must inform the availability of a right to recover under FELA"); *ante*, at 19 ("[T]he common law consistently has sought to place limits on . . . potential liability"); *ante*, at 21-22. ("[T]he common law in 1908 did not allow [prejudgment] interest"); *ante*, at 24 ("[T]he common law restricts recovery"); *ante*, at 26 ("Carlisle's . . . claim plainly does not fall within the common law's conception of the zone of danger"). But see *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . . It always is the law of some State . . . .).

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In my view, the Court of Appeals developed the appropriate FELA common-law approach and correctly applied that approach in these cases. I would therefore affirm the Court of Appeals' judgments.

RALPH G. WELLINGTON, Philadelphia, Pa. (NANCY WINKELMAN, BARRY L. REFSIN, SCHNADER, HARRISON, SEGAL & LEWIS, BRUCE B. WILSON, LUCY S.L. AMERMAN, and THOMAS J. WANSER, on the briefs) for petitioner; WILLIAM L. MYERS JR., Philadelphia, Pa. (G. SANDER DAVIS on the briefs) for respondent Gottshall; J. MICHAEL FARREL, Philadelphia, Pa. (WILLIAM L. BOWE, on the briefs) for respondent Carlisle.

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED APRIL 26, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CASE NUMBER: CV-91-2222 (ADS)

JOHN J. MARCHICA,

Plaintiff(s),

V.

LONG ISLAND RAILROAD COMPANY,

Defendant(s).

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED, that the plaintiff JOHN J. MARCHICA is 55% liable and the defendant LONG ISLAND RAILROAD COMPANY is 45% liable with respect to the plaintiff's injury, and the jury having awarded damage in the total amount of $280,000.00, the plaintiff is awarded damages in the amount of $126,000.00.

April 26, 1993
*Date*

ROBERT C. HEINEMANN
*Clerk*

*s/* Kenneth J. Zuniga
*(By) Deputy Clerk* Kenneth J. Zuniga

## APPENDIX D — *MARCHICA v. THE LONG ISLAND RAILROAD*, 850 F. SUPP. 445 (E.D.N.Y. 1993), MEMORANDUM DECISION AND ORDER DENYING PARTIAL SUMMARY JUDGMENT TO DEFENDANT, DATED JANUARY 26, 1993

JOHN L. MARCHICA, Plaintiff,

v.

THE LONG ISLAND RAILROAD, Defendant,

NO. CV 91-2222 (ADS).

United States District Court,
E.D. New York.

Jan. 26, 1993

Railroad worker brought action against employer to recover for fear of contracting AIDS after suffering puncture wound from hypodermic needle during work. Employer moved for summary judgment. The District Court, Spatt, J., held that: (1) Federal Employers' Liability Act encompasses cause of action for fear of contracting AIDS, and (2) questions of fact precluded summary judgment.

Motion denied.

Altier & Barasch, New York City (James P. Ruane, Philip Vogt, of counsel), for plaintiff.

Thomas M. Taranto, Long Island Rail Road Law Dept., Jamaica, NY, by Franklin W. Kronenberg, for defendant.

MEMORANDUM DECISION AND ORDER

SPATT, District Judge.

*Appendix D*

According to several recent commentaries, the Acquired Immune Deficiency Syndrome ("AIDS") "carries the potential to be the greatest natural tragedy in human history."[1] For the legal profession, the ramifications of this protean epidemic force those entrusted with applying the law into unexplored territory.

It is in this context that the instant case raises the question, for what appears to be the first time in this Circuit, whether the *fear* of contracting AIDS can form the basis of a cause of action under the Federal Employers' Liability Act ("FELA"). The defendant employer, the Long Island Rail Road, moves for summary judgment contending that there is no basis in law for such a cause of action in the circumstances of this case. The plaintiff, on the other hand, argues that these are precisely the circumstances Congress had in mind when it passed the FELA to protect federal employees in the work environment.

## BACKGROUND

John Marchica ("Marchica" or "the plaintiff") had been working for the Long Island Rail Road ("LIRR") as a structural welder for approximately seven years at the time of the incident alleged in the Complaint. On October 25, 1989, he was assigned by his supervisor to work at the Hempstead Railroad Station. Specifically, Marchica was directed to secure a metal grating above a window shaft in the station in order to prevent homeless people from getting into the trainmen's room. Marchica and his crew were to ensure that the grating could not be opened or raised

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1. William F. Masters, CRISIS; HETEROSEXUAL BEHAVIOR IN THE AGE OF AIDS (1988); Wayne R. Cohen, "An Economic Analysis of the Issues Surrounding AIDS in the Workplace: In the Long Run, the Path of Truth and Reason Cannot Be Diverted," 41 AM.U.L.Rev. 1199 (1992); David Margolick, "Legal System is Assailed on AIDS crisis," NEW YORK TIMES, January 19, 1992, p. 16, col. 1.

from the outside, but at the same time could be opened safely and quickly from the inside by the trainmen in case of emergency.

When he arrived at Hempstead Station, Marchica went through the station building and down into the trainmen's room where he observed a pile of debris, approximately three inches deep, at the bottom of the window shaft. The debris consisted of leaves, sticks, broken glass, papers and assorted refuse. According to the plaintiff, there had been a continuing problem with homeless people and drug addicts loitering in the area, and a number of break-ins or attempted break-ins of the trainmen's room had occurred.

It appeared to the plaintiff that it would be necessary to enter the shaft to secure certain pins to the wall to fasten the grating. According to Marchica, railroad regulations required him to clear away the litter before standing in the shaftway. While wearing heavy duty work gloves and clothing, the plaintiff reached into the shaftway with his right hand to clear away part of the pile when he suddenly felt a sharp pain. When he withdrew his hand, he observed a hypodermic needle which had penetrated his glove and was still embedded in his finger.

Marchica immediately removed the needle and for several seconds was in shock. He did not observe whether there was any fluid inside the barrel of the hypodermic. A co-worker retrieved the needle, placed it in a bag, and gave it to the plaintiff who was then taken by another co-worker to the Emergency Room at Winthrop University Hospital. At Winthrop, the plaintiff's wound was cleaned and he was advised to go for an HIV blood test and hepatitis shot and to abstain from all sexual contact for at least six months.

*Appendix D*

That same day, Marchica went to the LIRR Medical Department in Jamaica where he was examined by several doctors. According to the plaintiff, the doctors informed him that what he had been told at Winthrop Hospital was "ridiculous," that he "had nothing to worry about," and that he should "go home and wash [my] hands in warm soapy water and that cures all ills." (Marchica Deposition, pp. 35-36). When Marchica requested the needle from the doctors, he was advised that it was the property of the LIRR. The puncture wound healed after approximately one week.

The plaintiff then went to see his own physician, Dr. Homayoon, who referred him to the Medical Center at Stony Brook for further tests and treatment. Dr. Homayoon saw the plaintiff on several occasions and during one visit, he drew blood for an additional HIV test. In November, 1989 and April, 1990, additional HIV tests were performed.

Based on personal difficulties he was experiencing — which he ascribes to this incident and to the information he was given at Winthrop that it takes six months for the HIV virus to incubate — Marchica saw Dr. Jay Gassman, a psychologist in Lake Ronkonkoma, to whom he stated that he felt as if he were "on a death sentence" (Marchica Deposition, p. 42). The plaintiff complained of sleeping disorder, nightmares, disruption of his family bonds and increased irritability. At one point, he began receiving calls from co-workers saying that they heard he had died of AIDS. Numerous persons would not shake hands with him, and his co-workers, including his supervisor Barry Vernon, told him they were afraid they might catch something from him.

After seeing Marchica for approximately two months, Dr. Gassman referred him to Dr. Raymond Lambert, a Smithtown psychiatrist who prescribed several anti-depressants, including

Prozac and Taxmaraphin. Sometime in the first half of 1990, Marchica learned that the second HIV test was negative. In February, 1992, the plaintiff received a letter from the LIRR instructing him to go for a psychological evaluation, which was performed by Dr. Michael Melamed on April 6, 1992.

In June, 1992, Marchica brought this action pursuant to the FELA statute, 45 U.S.C. §§ 51-60 (1988), alleging that the defendant LIRR was negligent in failing to provide him with a safe place to work, specifically in failing to maintain the premises at the Hempstead Railroad Station in a reasonably safe condition, which caused both the physical and psychological injuries he sustained.

Essentially, one part of the plaintiff's claim sought compensation for the physical injury to his right hand, caused by the needle entering his finger. He also makes a claim for the resulting emotional distress attendant upon the physical injury, including a claim of fear of contracting AIDS. In his answer to interrogatory No. 26, the plaintiff listed these latter injuries as post-traumatic stress disorder, depression, anxiety, feelings of detachment or estrangement, restricted range of affect, sleep disturbances, concentration difficulties, irritability, outbursts of anger, psychological deterioration, extremely reduced social contacts, inability to engage in sexual relations with his wife, and diminution of the social relationship with his wife.

## PROCEDURAL SETTING

The defendant Long Island Rail Road moves, pursuant to Fed. R. Civ. P. 56, for partial summary judgment, dismissing certain elements of the alleged injuries and damages claimed by the plaintiff. Specifically, the LIRR asks the Court to "dismiss all claims relating or pertaining to the plaintiff's alleged fear of

contracting AIDS (Acquired Immune Deficiency Syndrome) on the grounds that there is no proof that the Plaintiff was exposed to the HIV (Human Immune Deficiency Virus) and the fact that the Plaintiff has been tested negatively for such exposure" (Kronenberg Affidavit, ¶ 2).

The defendant relies upon a series of cases which conclude that an injured party can not recover on a claim of fear of contracting a disease, including AIDS, where the plaintiff had not shown that he was exposed to the disease (*see, e.g., Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271 [3d Cir. 1985]; *Burk v. Sage Products, Inc.*, 747 F. Supp. 285 [E.D. Pa. 1990]; *Hare v. State*, 173 A.D. 2d 523, 570 N.Y.S. 2d 125 [2d Dept. 1991]; *Cathcart v. Keene Indus. Insulation*, 324 Pa. Super. 123, 471 A.2d 493 [1984]). The defendant maintains that the plaintiff has alleged no injury "which arose as the result of exposure to the HIV virus itself" (Defendant's Memorandum of Law at p. 14). According to the LIRR, the specific damages in this category are clearly "speculative" and therefore not recoverable.

In opposing the motion, the plaintiff contends that the defendant has a heavy burden to overcome in attempting to obtain summary judgment in this FELA cause of action. Relying upon *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F. Supp. 135 (S.D.N.Y. 1987), the plaintiff argues that railroad workers may assert claims under FELA for a wholly mental injury. In fact, the plaintiff maintains, it has been previously determined that a railroad worker who incurs physical *or* mental injury from unsafe working conditions has a claim under FELA (*see Yawn v. Southern Ry.*, 591 F.2d 312 (5th Cir.), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L. Ed. 2d 304 [1979]).

The plaintiff also asserts that the standard of care imposed

upon a railroad under FELA is substantially higher than that in an ordinary negligence case. Arguing that the railroad owed a higher statutory duty of care to its employee, counsel for the plaintiff states that the railroad breached its duty and that the breach caused the plaintiff's injuries. Counsel also notes that under FELA, the railroad is liable in damages if its failure to provide a safe place to work played any part, no matter how slight, in producing the plaintiff's injury.

## THE GOVERNING LAW

### A. *Summary Judgment Standard*

A court may grant summary judgment "only if the evidence, viewed in the light most favorable to the party opposing the motion, presents no genuine issue of material fact," *Cable Science Corp. v. Rochdale Village, Inc.*, 920 F.2d 147, 151 [2d Cir. 1990], and the movant is entitled to judgment as a matter of law (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 [1986]; *see also* Fed. R. Civ. P. 56[c]). The Court must, however, resolve all ambiguities and draw all reasonable inferences in the light most favorable to the party opposing the motion (*see Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 [2d Cir. 1990]; *Liscio v. Warren*, 901 F.2d 274, 276 [2d Cir. 1990]; *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 [2d Cir. 1986], *cert. denied*, 480 U.S. 932, 107 S.Ct. 1570, 94 L. Ed. 2d 762 [1987]).

Once a party moves for summary judgment, in order to avoid the granting of the motion, the non-movant must come forward with specific facts showing that a genuine issue for trial exists (*Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 [2d Cir. 1990] [quoting Fed. R. Civ. P. 56(e)]; *see National Union Fire*

*Ins. Co. v. Turtur*, 892 F.2d 199, 203 [2d Cir. 1989]). A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party" (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 [1986]; *see Converse v. General Motors Corp.*, 893 F.2d 513, 514 [2d Cir. 1990]).

However, mere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment (*see Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 [2d Cir. 1990]). If there is evidence in the record as to any material fact from which an inference could be drawn in favor of the non-movant, summary judgment is unavailable (*see Rattner v. Netburn*, 930 F.2d 204 [2d Cir. 1991]). Finally, the Court is charged with the function of "issue finding", not "issue resolution" (*Eye Assocs., P.C. v. Incomrx Sys. Ltd. Partnership*, 912 F.2d 23, 27 [2d Cir. 1990]).

B. *Federal Employer's Liability Act*

The FELA provides in pertinent part as follows:

> "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." (45 U.S.C. § 51).

*Appendix D*

## DISCUSSION

Following a review of the authorities, the Court is able to point to various cases which deal with the issues of (1) whether the fear of AIDS constitutes a cause of action under state tort law, and (2) whether a claim for negligent infliction of emotional distress is cognizable under FELA. The Court has been unable to find any case, in any jurisdiction, which has determined that FELA encompasses a cause of action solely involving the fear of contracting AIDS. However, based on the reasoning set forth in the cases that have been decided, this Court now concludes that FELA does encompass a cause of action for fear of contracting the AIDS virus where the basis of the claim is a documented physical injury sustained by the plaintiff.

### A. *Intent of the FELA Provisions*

A primary purpose of FELA "was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases" (*Atchison, Topeka and Santa Fe Ry. v. Buell*, 480 U.S. 557, 561, 107 S.Ct. 1410, 1413, 94 L. Ed. 2d 563 [1987]). The Supreme Court noted in *Buell* that "[w]e have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to accomplish [Congress'] objects' " (quoting *Urie v. Thompson*, 337 U.S. 163, 180, 69 S. Ct. 1018, 1029, 93 L. ED. 1282 [1949]).

The standard of negligence in FELA cases is significantly different from that found in ordinary negligence actions (*see Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 509, 77 S. Ct. 443, 450, 1 L. Ed. 2d 493 [1957]; *Eaton v. Long Island R.R. Co.*, 398 F.2d 738 [2d Cir. 1968]). As the Supreme Court stated in *Rogers*, "[j]udicial appraisal of the proofs to determine whether a jury

question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death" (352 U.S. at 506-507, 77 S. Ct. at 448-449). It has long been held that under FELA, "the right of the jury to pass upon the question of fault and causality must be most liberally viewed" (*Chicago, Rock Island & Pac. R.R. Co. v. Melcher*, 333 F.2d 996, 999 [8th Cir. 1964], quoted in *Eaton v. Long Island Rail Road Company*, 398 F.2d at 741).

As noted in § 51 of the FELA, four requirements must be met under FELA before a plaintiff can recover: (1) the plaintiff must have sustained an injury; (2) the plaintiff's work must involve a carrier engaged in interstate commerce; (3) there must be proof of negligence on the part of the defendant; and (4) the defendant's negligence must have played some role in the injury (45 U.S.C. § 51; *see also Halko v. New Jersey Transit Rail Operations*, 677 F. Supp. 135, 139 [S.D.N.Y. 1987]).

In the instant case, it is undisputed that the plaintiff injured a finger of his right hand in the form of a puncture wound. It is also undisputed that the plaintiff's work involved a carrier engaged in interstate commerce. The remaining issues concern proof of the LIRR's alleged negligence and whether such negligence played some role in the plaintiff's injury.

B. *"Emotional Distress" under FELA*

In addition to the physical injury to his right hand, the plaintiff claims a major additional emotional injury in that following the puncture of his finger by the needle, he was forced to live day-to-day with the fear of contracting AIDS, premised upon his knowledge that his initial physical injury was caused by a dirty,

discarded hypodermic needle. Essentially, this is a claim for the negligent infliction of emotional distress leading to post-traumatic stress and accompanying psychological difficulties following a particular type of physical injury.

In reviewing this matter, the Court takes note of the seminal case of *Atchison, Topeka and Santa Fe Ry. v. Buell*, 480 U.S. 557, 561, 107 S. Ct. 1410, 1413, 94 L. Ed. 2d 563 (1987), in which the Supreme Court reviewed, as an ancillary matter and without deciding the question, whether purely "emotional injury" was cognizable under FELA. Although the emotional injury asserted in the instant case is premised upon an actual physical injury, the Court finds that *Buell* offers some guidance in this area:

> ". . .whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. . . . Moreover, some States consider the context and the relationship between the parties significant, placing special emphasis on the workplace. In addition, although many States have now recognized a tort of negligent infliction of emotional distress, they too vary in the degree of objective symptomatology the victim must demonstrate. . . . In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive 'yes' or 'no' answer" (480 U.S. at 568-570, 107 S.Ct. at 1417-18).

The Court notes as an aside that the Supreme Court has denied *certiorari*, with two justices dissenting, in recent cases reaching

different results on the question of whether FELA extends to claims based purely on emotional distress (*see Ray v. Consolidated Rail Corp.*, 721 F. Supp. 1017 [N.D. Ill. 1989], *aff'd*, 938 F.2d 704 [7th Cir. 1991], *cert. denied*, __U.S.__,112 S. Ct. 914, 116 L. Ed. 2d 813 [1992]; *Carroll v. Consolidated Rail Corp.*, 1991 WL 32859 [E.D. Pa.], *aff'd*, 941 F.2d 1200 [3d Cir. 1991], *cert. denied*, __U.S.__, 112 S. Ct. 916, 116 L. Ed. 2d 816 [1992].

Courts in various circuits have found that a claim for negligent infliction of emotional distress is cognizable under FELA and that plaintiffs can assert claims under FELA for a wholly mental injury (*see, e.g., Taylor v. Burlington N.R.R. Co.*, 787 F.2d 1329 [9th Cir. 1986]; *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 [5th Cir.], *modified*, 797 F.2d 256 [5th Cir. 1986]. In both *Taylor* and *Hagerty*, the defendants argued that FELA covered only physical injuries. However, the court in *Taylor* determined that where continuing harassment by the defendant's foreman led to the plaintiff's paranoid schizophrenia, the plaintiff was eligible to assert a claim for wholly mental injury (*Taylor*, 787 F.2d at 1313). Likewise, in *Hagerty*, the court held that a seaman drenched in harmful chemicals during the course of his employment was eligible to assert an emotional injury claim based upon his fear of developing cancer in the future.

Closer to home, the Court looks to *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F. Supp. 135 (S.D.N.Y. 1987), in which the widow of a Conrail employee brought a FELA action alleging that Conrail and the corporation which took over Conrail in New Jersey were negligent in failing to properly hire, train, and supervise its management, which contributed to the employee's suicide. The district court found that the continuing harassment of supervisors could have a causal connection to Halko's suicide. The court observed that "[i]n this case, there certainly is a physical

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE LONG ISLAND RAILROAD COMPANY,

*Petitioner,*

*v.*

JOHN J. MARCHICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Was the decision of the Second Circuit consistent with this Court's holding in *Consolidated Rail Corp. v. Gottshall*, No. 92-1956, 62 U.S.L.W. 4609 (June 24, 1994)?

## PARTIES

Petitioner, The Long Island Railroad Company (LIRR) is a public benefit corporation which is a wholly owned subsidiary of the Metropolitan Transportation Authority, a public authority of the State of New York.

Respondent, John J. Marchica, is an individual.

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## RESPONDENT'S BRIEF IN OPPOSITION

*TO THE HONORABLE SUPREME COURT:*

The Respondent, **JOHN J. MARCHICA**, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, **The Long Island Railroad Company.**

## OPINIONS BELOW

This case was brought in the Eastern District of New York pursuant to the Federal Employees Liability Act (FELA). On January 26, 1993, the Long Island Railroad's (LIRR) motion for partial summary judgment was denied. *Marchica v. LIRR,* 850 F. Supp. 445 (E.D.N.Y. 1993). After trial, final judgment was entered and the LIRR appealed to the Second Circuit Court of Appeals under 28 U.S.C. §1291 and 1294.

The Second Circuit unanimously affirmed the judgment by opinion dated July 20, 1994. The Second Circuit's opinion as reproduced in the Appendix to the LIRR's petition for Writ of Certiorari.

## STATUTE INVOLVED

The statute in issue is 45 U.S.C. §51 et seq. (FELA).

## STATEMENT OF THE CASE

On October 25, 1989, John J. Marchica, a LIRR employee, was assigned to weld shut a sidewalk grate to prevent vagrants from gaining entry through it to the lower level of the LIRR station building in Hempstead, New York. Sparks from Marchica's welding torch caused the debris and leaves at the bottom of the shaft to smolder. In attempting to remove the debris, Marchica's hand was punctured by a bloody hypodermic syringe. Marchica had to forcibly withdraw the syringe from his palm.

In fear of having been exposed to the HIV virus, Mr. Marchica sought diagnostic testing and received counseling from a psychologist and psychiatrist. He developed rashes, suffered from nausea, sleeping disorders and dizziness, all symptoms of AIDS. It was not until

the trial, approximately 3½ years after the accident that Marchica discovered for certain that he did not contract AIDS. During the 3½ year period, he lived with the constant fear that he was going to die, leaving behind his wife and children. The health care providers concurred that Marchica sustained emotional distress, specifically diagnosing his condition as severe post traumatic stress disorder. He was treated with Prozac and continued counselling. Marchica sued under the FELA for negligent infliction of emotional distress based upon the fact that he was clinically diagnosed as suffering from the permanent condition of post traumatic stress disorder.

At the close of discovery the LIRR moved for summary judgment contending that mental distress claims were not actionable under the FELA and that plaintiff could not prove he had been exposed to the HIV virus. The District Court denied the motion for summary judgment and allowed the case to proceed to trial.

At trial, the jury rendered a verdict apportioning 55% of the fault to Marchica, 45% to the LIRR, and awarded Marchica $225,000 for past emotional distress and $55,000 for future emotional distress. Based on the apportionment, judgment was entered on May 4, 1993 in the amount of $126,000.00.

The LIRR appealed to the Second Circuit Court of Appeals. The LIRR based its appeal on several theories, including: 1) that proof of exposure to a disease is a prerequisite in fear of disease cases; 2) plaintiff did not exercise due diligence in informing himself about the disease; 3) public policy in preventing a flood of similar cases; and 4) that an award for future damage was improper.

By opinion dated July 29, 1994, the Second Circuit Court of Appeals unanimously rejected all of the LIRR's

arguments. Relying on *Consolidated Rail Corp. v. Gottshall,* No. 92-1956, 62 U.S.L.W. 4609 (June 24, 1994) ("*Gottshall*") the Second Circuit found that Marchica had met the zone of danger test established in *Gottshall.* The Second Circuit distinguished the body of case law requiring proof of exposure to a disease for two reasons: 1) Marchica was physically injured thereby assuring "genuineness" of his claim; and 2) there is support in the case law for the theory that proof of exposure is not required and the liberal interpretation of FELA requires deference to that body of law.

Petitioner bases the instant appeal on two of the exact same theories it used in the court below. The principal theory of petitioner is that the courts should apply the more restrictive body of case law developed in fear of disease cases. The second theory is that affirmance of the Second Circuits's opinion would expose rail carriers to a flood of lawsuits. In making this argument, the petitioner asks this court to ignore the zone of danger requirement established in *Gottshall,* disregard the body of case law permitting recovery in fear of disease cases without proof of exposure, and disregard the fact that plaintiff's award was based on the clinical diagnosis of post traumatic stress disorder.

## SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. It merely challenges the district court's interpretation of *Gottshall.*

II. Petitioner's "floodgates" theory is disengenuous based on the remedial purpose of the FELA and totally unbased in reality.

## REASONS FOR DENYING THE WRIT

The Petitioner fails to satisfy criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari. The Court below properly adhered to both the letter and spirit of the Statute (FELA) as most recently construed by this Court in *Consolidated Rail Corp. v. Gottshall,* No. 92-1956, 62 U.S.L.W. 4609 (June 27, 1994).

The Court below did not decide this case until *Gottshall* was decided and obviously was diligently conforming to the standard established by this Court. Further, the facts in this proceeding are sufficiently unique that their precedential value is likely to be minimal.

### I.

### THE SECOND CIRCUIT IN ITS OPINION RELIED ON THE STANDARD ESTABLISHED BY THIS COURT IN GOTTSHALL.

The Second circuit's decision in this case conforms to this Court's holding in *Gottshall.* The decision of the court below was issued after *Gottshall* and clearly relies on the standards established in that case.

Petitioner's brief glaringly fails to mention the actual holding in the *Gottshall* case. Petitioner bases its entire brief on the same argument it attempted in front of the Second Circuit. That is, the more restrictive body of case law developed in fear of AIDS cases should be adopted for FELA cases. In doing so, petitioner fails to analyze *Marchica* according to the standards established in FELA cases in general, and specifically in *Gottshall.*

In *Gottshall,* this court adopted the common law "zone of danger" test for FELA cases, reasoning

> that allowing recovery for negligently inflicted emotional injury as provided for under the zone of danger test best harmonizes these considerations. Railroad employees will thus be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact. (Pet. at 52a).

The "zone of danger" test

> limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. That is, "those within the zone of danger of physical impact can recover for fright, and those outside of it cannot" (Pet. at 43a).

John Marchica was not only threatened with physical impact, he was physically injured by the puncture of his palm with a bloody syringe. As a result of this puncture and its attendant circumstances, Mr. Marchica developed post traumatic stress disorder, a permanent psychiatric injury. Given the fact that Marchica was physically injured, the Second Circuit concluded that the "zone of danger" requirements were met.

Furthermore, the Second Circuit distinguished the *Marchica* case from the rules regarding "fear of future diseases". To quote the Second Circuit, "Since Marchica suffered an actual physical injury, the rule governing fear of future disease is inapposite and the traditional negligent infliction of emotional distress analysis applies." That analysis was performed by the Second Circuit under the "zone of danger" test adopted in *Gottshall.* Accordingly, petitioner's writ should be denied.

## II.

## THE "FLOODGATES" ARGUMENT PRESENTED BY PETITIONER IS UNBASED IN FACT AND IS CONTRADICTORY WITH THE REMEDIAL PURPOSE OF THE FELA.

It is utterly disingenuous of appellant to attempt a public policy type argument in this case. It is an historical fact that the FELA was enacted to afford maximum protection to railroad employees, the danger of whose employment is legendary.

Appellant's position is in direct contradiction with the intent of the drafters of the FELA and its interpretation in a long line of Supreme Court cases. *See, Urie v. Thompson,* 337 U.S. 163 (1949). This court has "liberally construed FELA to further Congress' remedial goal." *Gottshall,* pet. at 37a.

According to Appellant, the consequence of affirming the Second Circuit's opinion would be an unstoppable deluge of "fear of AIDS" cases by railroad employees. It has been almost two years since the district court rendered its decision permitting Marchica's case to proceed to trial. The case was widely reported yet the appellant has failed to offer any proof that the "floodgates" have indeed opened in the past two years.

Given the unique circumstances of the *Marchica* case, it is highly unlikely that the Second Circuit's opinion will lead to the epidemic of suits predicted by petitioners. Several factors combined to create the situation in which Marchica was permitted to recover. First, the LIRR failed to inspect and maintain the area in which the plaintiff was injured. Second, the defendant sent plaintiff into an area frequented by drug users and littered with drug paraphernalia, such as needles and crack vials. Third, plaintiff was stuck with a bloody

needle which became impedded in his palm. Fourth, the LIRR's medical staff discarded the needle before testing it. Thus it was impossible for Mr. Marchica to know whether or not he had been infected by the HIV virus. He was forced to wait years before his doctors were able to tell him that he had not contacted the deadly disease. If an appellant feels that this situation could be repeated thousand of times perhaps it should consider the remedial purpose of the FELA and clean up its stations.

The Second Circuit carefully followed the standards established in *Gottshall* in rendering its decision. The peculiar circumstances of the *Marchica* case will give the case little precedential value.

## CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a writ of Certiorari should be denied.

Respectfully submitted,

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